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No. 97-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

OFFICIAL COMMITTEE OF TORT CLAIMANTS,

Petitioner,

—v.—

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, and CORNING INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court of appeals may review on mandamus a decision ordering mandatory abstention with respect to claims against nondebtor defendants in light of the proscription against appellate review contained in 28 U.S.C. § 1334(d).

2. Whether 28 U.S.C. § 157(b)(5) empowers a district court in which a Chapter 11 bankruptcy case is pending against a tortfeasor debtor corporation to transfer to itself, from state and federal courts throughout the country, cases pending against alleged joint tortfeasors that are not debtors in the bankruptcy.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, the following parties participated in proceedings in the Sixth Circuit: Heidi Lindsey; John M. O'Quinn; Johnson County, Texas, Plaintiffs; Breast Implant Tort Claimants Represented by John O'Quinn; Office of the United States Trustee; MDL Panel; Baxter Healthcare Corp. and Baxter Int'l, Inc.; Minnesota Mining and Mfg. Co.; Bristol-Myers Squibb Co. and Medical Engineering Corp.; California Plaintiffs' Steering Committee, as *amicus curiae*; Official Committee of Unsecured Creditors, as Intervenor.

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No. 97-___

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

OFFICIAL COMMITTEE OF TORT CLAIMANTS,

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-v.-

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, and CORNING INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner, the Official Committee of Tort Claimants (the "Tort Committee") of Dow Corning Corporation ("Dow Corning" or the "Debtor"), petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit issued on May 8, 1997. The Sixth Circuit reversed the holding of the United States District Court for the Eastern District of Michigan ordering mandatory and discretionary abstention with respect to state law tort claims pending against nondebtor corporate defendants that the Debtor had sought to transfer to the District Court overseeing its bankruptcy. Review is sought

of the holding that the Court of Appeals had subject matter jurisdiction to issue a writ of mandamus reversing the abstention decision notwithstanding the provision of 28 U.S.C. § 1334(d) that decisions granting abstention are "not reviewable by appeal or otherwise by the court of appeals." The Tort Committee also seeks review of the Sixth Circuit's underlying holding that 28 U.S.C. § 157(b)(5) permits transfer of claims against nondebtors.

OPINIONS BELOW

The District Court's unreported decision ordering mandatory and discretionary abstention for all pending nondebtor cases was issued on July 30, 1996 and is reprinted at 13a-20a. The Sixth Circuit's May 8, 1997 decision granting mandamus and reversing the July 30 decision, reprinted at 1a-12a, is reported at 113 F.3d 565.

The District Court previously issued two opinions on September 12, 1995 that were the subject of earlier appeals to the Sixth Circuit. The one relevant here denied on jurisdictional grounds Dow Corning's motion to transfer claims pending against its corporate parents, Dow Chemical Company ("Dow Chemical") and Corning Incorporated ("Corning"). It is reprinted at 49a-76a and reported at 187 B.R. 919. The Sixth Circuit reversed that decision on April 9, 1996, holding that claims against the nondebtors were within the District Court's "related to" jurisdiction and could be transferred pursuant to 28 U.S.C. § 157(b)(5). That decision, reported at 81 F.3d 635, was withdrawn, and an amended opinion, issued on June 3, 1996, is reported at 86 F.3d 482. The latter decision, reprinted at 21a-48a, was the subject of a petition for a writ of certiorari, which was denied on January 6, 1997, 117 S. Ct. 718.

JURISDICTION

The decision of which review is sought was issued on May 8, 1997. This Court has jurisdiction to grant a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1334(c)(2) provides: "Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction."

28 U.S.C. § 1334(d) provides in relevant part: "Any decision to abstain or not to abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title."

28 U.S.C. § 157(b)(5) provides: "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending."

STATEMENT OF THE CASE

The Petitioner Tort Committee was appointed in Dow Corning's bankruptcy case to represent the interests of hundreds of thousands of product liability/tort claimants against the Debtor. The Debtor's principal liability consists of billions of dollars of claims by women suing for diseases and injuries alleged to have been caused by silicone gel breast implants created and marketed by the Debtor and others. As asserted against the Debtor and Dow Chemical, the pertinent facts may be summarized as follows:

The first breast implant using silicone manufactured by the Debtor was implanted into a woman in 1962 -- at a time when the safety of the implanted materials had not been tested on any animal. Relying for silicone's safety on inadequate research dating from the 1940s and no testing, the Debtor began actively marketing silicone breast implants in 1964, representing that silicone products were permanent, completely safe, and non-toxic. *See In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 887 F. Supp. 1455, 1457-58 (N.D. Ala. 1995) (vacating summary judgment in favor of Dow Chemical). Claims against the Debtor and Dow Chemical include charges of negligence, fraud, and conspiracy based on their failure to disclose substantial amounts of data indicating dangers of serious disease from silicones let loose in the human body and the disease and injuries caused to the plaintiffs by silicone gel implants.

When a global class action settlement negotiated in proceedings before District Judge Sam C. Pointer, Jr., in Alabama collapsed in 1995, Dow Corning entered bankruptcy and the claims pending against it were automatically stayed. Claims have proceeded, however, against nondebtor

defendants, including Dow Chemical, which has been sued for its allegedly independent tortious conduct in connection with development and testing of silicone for medical purposes.

As noted, upon filing for Chapter 11 protection (on May 15, 1995), the Debtor had an automatic stay of all actions against it under Bankruptcy Code § 362(a). In addition, the Debtor immediately commenced an adversary proceeding seeking a temporary restraining order (denied on May 26, 1995) and then a preliminary injunction under § 105 of the Bankruptcy Code barring opt-out plaintiffs from proceeding to trial against its nondebtor shareholders, Dow Chemical and Corning. After the Debtor abandoned its efforts to present adequate proof to justify a preliminary injunction, Bankruptcy Judge Arthur Spector dismissed the proceeding on June 8, 1995, and no appeal was taken.

The Debtor then sought to bar litigation against its shareholders by moving on June 12, 1995 to transfer to the district court not only the already stayed cases against itself but also those proceeding towards trial against Dow Chemical and Corning. Three other nondebtor breast implant defendants, also large corporations not in bankruptcy, moved two days later for transfer of cases pending against them.

The District Court ordered transfer of the claims pending against the Debtor, leaving the case files in the courts where the claims were pending (in most cases, before Judge Pointer in Alabama, to whom many cases had been transferred by the Panel for Multi-District Litigation following removal). The District Court held that it lacked "related to" jurisdiction under 28 U.S.C. § 1334(b) over claims against nondebtor defendants. That decision was

reversed by the Sixth Circuit last year in *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Health Care Providers (In re Dow Corning Corp.)*, 86 F.3d 462 (6th Cir. 1996) ("*Lindsey I*"), *cert. denied*, 117 S. Ct. 718 (1997). The court found "related to" jurisdiction over claims against nondebtor defendants because of the potential for claims against jointly held insurance (with respect to the shareholders) and for contribution claims against the estate (with respect to all of the nondebtor defendants) and held that 28 U.S.C. § 157(b)(5) authorized transfer of nondebtor cases. With no appeal issue as to abstention before it, the Circuit observed that this subject would remain open before the District Court on the remand, noting that "the district court is in a better position to make the necessary abstention determinations." 86 F.3d at 498.

Following remand, the District Court issued an order on July 30, 1996 holding that both mandatory and permissive abstention were appropriate for all the nondebtor breast implant claims. The Debtor and the nondebtor defendants appealed from this decision, and the Tort Committee moved to dismiss the appeal on the ground that decisions granting abstention under 28 U.S.C. § 1334(c) are not reviewable on appeal or otherwise, under 28 U.S.C. § 1334(d), quoted above at p. 3.

The Court of Appeals, however, treated the appeal as a petition for mandamus and granted mandamus to Dow Corning, reversing the global abstention rulings with respect to Dow Chemical and Corning. The court found that it had jurisdiction on two grounds: First, it said, because Judge Hood had failed to follow its earlier mandate by improperly abstaining globally and, second, because Congress had omitted 28 U.S.C. § 1651 from the list of statutes recited in

§ 1334(d), giving rise to the inference under the maxim "expressio unius est exclusio alterius" that it intended thereby to make abstention rulings reviewable by mandamus. The court remanded with instructions to the District Court to conduct a case-by-case analysis to determine which pending proceedings were subject to mandatory abstention. *See Lindsey v. Dow Chemical Co. (In re Dow Corning Corp.)*, 113 F.3d 565, 569, 572 (6th Cir. 1997) *("Lindsey II")*. The Sixth Circuit left standing the abstention decision with respect to the other nondebtor defendants, which have no corporate relationship to the Debtor.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals, allowing mandamus as a means of reviewing a mandatory abstention decision, is at war with the unambiguous proscription of such review in 28 U.S.C. § 1334(d) and with the principles of this Court's decisions enforcing similar statutory prohibitions against appeals of orders to remand state law cases to the state courts from which removal was attempted. The asserted justifications for this use of mandamus amount to effective nullification of the statutory bar, which is meant to enforce respect for expeditious state proceedings.

Preceding and underlying the issue of appellate jurisdiction, the Sixth Circuit's decision that 28 U.S.C. § 157(b)(5) requires or permits transfer of claims against nondebtor defendants, which have not submitted themselves to the bankruptcy jurisdiction, represents an unwarranted expansion of a statute that merely empowers the district court sitting in bankruptcy to determine the venue for liquidating personal injury claims *against the estate*. Reversal on this point would enforce cognate principles and lead to the same

result as the district court's abstention decision: leaving state law tort litigation against nondebtors where it belongs -- in state court. Both interrelated points are of vast importance in regulating the bankruptcy jurisdiction and confining it to bounds consistent with the claims of federalism.

1. This case affects thousands of tort claimants and their relationship to the second largest bankruptcy in United States history. The Sixth Circuit's granting of mandamus presents a question of importance that is likely to reverberate in future mass tort bankruptcies. But even if the setting did not bespeak the importance of the issues presented, the case would present compelling issues as to the breadth of the Circuit's appellate jurisdiction measured against direct limitations imposed by Congress as such limitations have been construed in apposite decisions of this Court.

28 U.S.C. § 1334(d) provides that orders granting mandatory or discretionary abstention "are not reviewable on appeal or otherwise by the court of appeals." This Court made clear in *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), that identical language in 28 U.S.C. § 1447(d) absolutely bars review -- by mandamus as well as on appeal -- of orders remanding cases on any of the grounds specified in § 1447(c).[1] Violation of this rule has led to

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[1] In *Thermtron* the Court found the statutory barrier to appeals inapplicable because the remand had been ordered "on grounds not authorized by § 1447(c)." *Id.* at 344. No similar argument is available to respondents here, where the mandatory and discretionary abstention order was precisely the kind of "decision to abstain" declared by 28 U.S.C. § 1334(d) to be "not reviewable by appeal or otherwise."

summary reversal. *See Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723, 724 (1977). The Court has also recently considered the effect of 28 U.S.C. § 1452(b), which contains the same bar against appeals of remand orders following removal in connection with bankruptcies. *Things Remembered, Inc. v. Petrarca*, 116 S. Ct. 494, 496-97 (1995). The Court there pronounced the principle leading to the unanimous affirmance of the Sixth Circuit, a principle from which the latter court departed in the present case: "Congress has placed broad restrictions on the power of federal appellate courts to review district court orders remanding removed cases to state court." *Id.* at 496. *See also In re United States Brass Corp.*, 110 F.3d 1261, 1266 (7th Cir. 1997) (Posner, J.) (observing that § 1452(b) "bars review by appeal or otherwise, which would seem to take in mandamus").

The Court in *Thermtron* observed the basis for the Congressional policy against review of remand orders: "to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues." *Id.* at 351. *See also, e.g., United States v. Rice*, 327 U.S. 742, 752 (1946) (discussing "Congressional policy of avoiding interruption of the litigation of the merits of removed causes, properly begun in state courts"); *Pierpoint v. Barnes*, 94 F.3d 813, 819 (2d Cir. 1996) ("Review of remand orders delays litigation and adds unnecessary expense. A firm policy of declining to review remand orders allows litigants to proceed with the litigation in a timely fashion in state court."), *cert. denied*, 117 S. Ct. 1691 (1997).

The Sixth Circuit in this case has announced two untenable grounds for departing from the settled rule against appeal of abstention and remand orders. First, the court held

that the District Court's July 30 decision violated the Circuit's mandate by failing to analyze abstention on a case-by-case basis. *See* 113 F.3d at 569, App. 6a-7a. But the Circuit's earlier decision had involved only the question whether claims against nondebtors fell within the "related to" jurisdiction of § 1334(b). There was no occasion on that appeal to rule on mandatory or discretionary abstention, although the Circuit saw fit to go on and state general guidelines for that subject. The anticipatory statement of the court's views could not create appellate jurisdiction, forbidden by statute, when an attempted appeal later proposed the issues, for the first time, as matters for decision.

In any event, the Sixth Circuit's principal ground for finding that it had mandamus jurisdiction was application of the doctrine of "expressio unius est exclusio alterius" to infer that Congress had intended to make mandamus review available when, in 1990, it added to § 1334(d) a recitation of several statutes under which review was unavailable but did not include a reference to the All Writs Act, 28 U.S.C. § 1651, which serves as the jurisdictional basis for orders of mandamus. *See Lindsey II*, 113 F.3d at 569, App. 7a. But the error in this analysis is demonstrable in several ways. First, the court ignored that the same language was also added to § 1452(b) but that no case has ever found that the amendment to either section operates to permit mandamus review. Even more central here is this Court's teaching that "basic general principles of statutory construction" like expressio unius "must yield to clear contrary evidence of legislative intent." *National R. Passenger Corp. v. National Assoc. of R. Passengers*, 414 U.S. 453, 458 (1974). The "contrary evidence" in this case is compelling.

Congress amended § 1334(d) and specified the statutes under which review was not to be allowed, not to make mandamus relief available, but to make clear that appellate review is prohibited only in the Courts of Appeals and this Court, while abstention decisions in the bankruptcy court may be reviewed in the district court:

> Section 309 would amend 11 U.S.C. 305(c) and [28] U.S.C. 1334(c)(2) and 1452(b) to clarify that, with respect to certain determinations in bankruptcy cases, *they forbid only appeals from the district courts to the courts of appeals, not from bankruptcy courts to the district courts*.
>
> The statutes provide that bankruptcy judges' orders deciding certain motions (motions to abstain in favor of, or remand to, state courts) are unreviewable "by appeal or otherwise." Because bankruptcy judges may enter trial orders only if there is appellate review in an Article III court, one result of this limitation is that bankruptcy judges cannot make final judgments in such cases even when they clearly involve "core" proceedings.
>
> Section 309 would authorize bankruptcy judges to enter binding orders in connection with abstention determinations under Title 11 or Title 28 and remand determinations under Title 28, subject to review in the district court. The statutory language under each of these sections now provides that the decision of the bankruptcy court (to abstain or remand)

> "is not reviewable by appeal or otherwise." The proposed amendment would modify these three sections to provide that the decision of the bankruptcy court is not reviewable "by the court of appeals . . . or by the Supreme Court of the United States . . ." Such determinations would therefore be reviewable by the district court.

136 Cong. Rec. S17570-02, *17580, 101st Cong., 2d Sess., Oct. 27, 1990 (ellipses in original; emphasis added). It is clear that the particular statutes were recited to erase any conceivable doubt that review only in the Courts of Appeals and this Court would be barred; there is no sound way to discover a new intention by Congress to make mandamus review available under a statute that previously had barred it.[2]

There is no basis for distinguishing among §§ 1447(d), 1334(d), and 1452(b), all of which manifest the "strong congressional policy" against review of abstention and remand orders. *See Things Remembered*, 116 S. Ct. at 499 (Ginsburg, J. concurring); *see also Sheet Metal Workers' Int'l Assoc. v. Carter*, 450 U.S. 949 (1981) (Rehnquist, J., dissenting from denial of certiorari) (failure to follow Congressional mandate against review of remand orders

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[2] As noted above, this Court has held that under 28 U.S.C. § 1447(d), which contains the same language without the enumeration of statutes, mandamus review is not available when remand is ordered on a ground covered by the statute. *See Thermtron Prods.*

warrants "at least review by this Court, if not summary reversal").[3]

In reaching out to find mandamus jurisdiction here, the Court of Appeals cited cases authorizing mandamus to address "questions of unusual importance necessary to the economical and efficient administration of justice." 113 F.3d at 569 (quoting *E.E.O.C. v. K-Mart Corp.*, 694 F.2d 1055 (6th Cir. 1982)). But the authority cited concerned the use of mandamus to circumvent problems of *finality* with respect to issues that would otherwise be reviewable on appeal from a final order. The Circuit cited no case (and we know of none) in which mandamus jurisdiction was invoked to review a decision expressly placed beyond appellate review as a substantive matter by Congress. The Circuit's unprecedented expansion of mandamus provides a strong basis for the granting of certiorari.

2. An additional ground for granting the petition is the Circuit's holding that 28 U.S.C. § 157(b)(5) empowers a district court sitting in bankruptcy to order transfer to itself of any "related to" case from anywhere in the country. The holding represents a plain misreading of the statute that,

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[3] Even with respect to discretionary abstention decisions under non-statutory doctrines as to which Congress has not proscribed appellate review, a plurality of this Court has held that such determinations "ought not to be overridden by a writ of mandamus" because "[w]here a matter is committed to the discretion of a district court, it cannot be said that a litigant's right to a particular result is 'clear and indisputable.'" *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665-66 (1978) (opinion of Justice Rehnquist joined by Justices Stewart, White, and Stevens).

combined with the Circuit's expansive reading of "related to" jurisdiction, threatens to undermine the balance struck by Congress in defining the powers of courts sitting in bankruptcy.[4]

The starting point for analysis is, of course, the language of § 157(b)(5):

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

The most striking thing about that provision for present purposes is that the word "transfer" is nowhere to be found in it. The result of that omission for the nondebtors is that they had no basis in law for the transfers they sought.

Section 157(b)(5) is a venue-setting provision for personal injury tort cases *against the debtor*. This becomes clear from the setting of this provision within § 157 as a

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[4] This issue was raised in the petition for certiorari that was denied earlier this year, 117 S. Ct. 718. However, the previous petition was vigorously opposed on grounds of mootness because of the district court's intervening abstention ruling. That asserted obstacle is gone now, and the reversal of the abstention order gives rise to the first of the questions presented for review. The related question of "transfer" under § 157(b)(5) creates a wider focus for interrelated aspects of the bankruptcy jurisdiction.

whole, which deals generally with the division of responsibility between the district and bankruptcy courts. Literally, of course, when § 157(b)(5) refers to "personal injury and wrongful death claims" without qualification, it could mean such claims against anyone, anywhere. But it obviously does not mean that. It means non-core proceedings triable by the district court, not the bankruptcy court. *See In re United States Lines*, 128 B.R. 339, 341 (S.D.N.Y. 1991). What kind of non-core proceedings? Section 157(b)(2)(B) answers this question: "personal injury tort or wrongful death claims *against the estate*" (emphasis added).

The looser conception of § 157(b)(5) has crept into some cases because "transfer" is a perfectly sensible word to apply to the power over cases in which *the debtor* is a defendant. Such cases are automatically *in* the bankruptcy court in the fundamental sense that they are held in place by that court by virtue of the automatic stay imposed by Bankruptcy Code § 362(a). For those cases, the bankruptcy district court is empowered to say whether they may be tried at all so long as the bankruptcy is pending. It is a rational corollary to grant the power to say *where* they may be tried. In that orderly scheme of things, it is suitable to speak of the venue-setting power of the district court as a power of "transfer." But the notion of a wider power over cases between nondebtors is embraced neither by the statutory language nor by the essential scheme of the relevant Bankruptcy Code provisions.

As against the sound understanding that § 157(b)(5) refers to claims against a bankrupt estate, the extraordinary power to transfer nondebtor cases from courts throughout the country, both state and federal, is a kind of sweeping authority that would require the most persuasively explicit

statutory language. When Congress meant to provide for transfer only of cases pending in *federal courts*, and then only for purposes of pretrial handling, it created a special multi-judge tribunal for the purpose. 28 U.S.C. § 1407. There is no persuasive suggestion anywhere that Congress intended to grant the headier power the respondents claim -- to pluck cases out of state and federal courts everywhere into the jurisdiction of any single district judge in bankruptcy cases. That power, if it had ever been contemplated, would entail (in this and other cases) the compelled transfer *for trial* of litigants, their witnesses, and their lawyers to a federal forum alien to and often distant from the states in which (and under the laws of which) the cases had been brought. A result so astounding is nowhere embraced in or foretold by the visible language and purpose of 28 U.S.C. § 157(b)(5).

The contrary view pressed by respondents and adopted by the Sixth Circuit has its judicial origin and principal support in *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), which turns out upon close inspection to be strange authority indeed, notably because no transfer of claims against nondebtors -- or even claims against the debtor -- ultimately was ever authorized or made in that case. It is true that Judge Mehrige ordered transfer there of "related to" cases, but his order to that effect was remanded because the affected parties had not received necessary notice of the proposed transfers. *Id.* at 1015-16. On remand, that notice was never given; the transfers never happened; and the *Robins* reorganization went forward to completion unimpeded. *See* Richard B. Sobol, *Bending the Law: The Story of the Dalkon Shield Bankruptcy* 66 (1991).

Moreover, the Fourth Circuit's discussion of the transfer issue in *Robins* proceeds entirely upon considerations relating to suits *against the debtor* and does not reason at all about the subject of possible "related" cases against nondebtors. The Fourth Circuit's opinion repeatedly refers to "tort cases against a Chapter 11 debtor" (788 F.2d at 1010); transfer of venue "of a case against the bankrupt to another district" (*id.* at 1010-11); "personal injury tort claims against a debtor" (*id.*); and so on for several pages. Codefendants are mentioned only in one passing reference (*id.* at 1016), strongly suggesting that the court simply never focused on the question whether § 157(b)(5) was intended to permit transfer of nondebtor claims.

The Sixth Circuit relied heavily on statements in *Robins* that claims against A.H. Robins could not be estimated or a dispute resolution facility established unless all Dalkon Shield claims were physically consolidated in one forum. *See* 44a-46a. But that proved to be an illusion; it is undisputed that (1) no cases were ever actually transferred in the Robins bankruptcy and (2) the lack of such a transfer had not a whit of impact on the district court's ability to estimate the value of the Dalkon Shield claims and resolve the bankruptcy by establishing a claims resolution facility. Thus, to the extent the Fourth Circuit in *Robins* spoke in terms that would stretch the boundaries of § 157(b)(5) to achieve a policy goal, it has since become clear that the attainment of that goal is unrelated to any purported need to transfer cases. Estimation and liquidation of pending tort claims are two different things, and only the former need occur in the centralized bankruptcy forum. Even more clearly, it is wholly unnecessary to have claims against *non*debtors transferred.

In short, the correct reading of 28 U.S.C. § 157(b)(5) is a further question of moment adding measurably to the reasons for granting the writ.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Argued April 24, 1997 Decided May 8, 1997

Nos. 96-2005, 96-2008 to 96-2013 and 96-2139.

In re DOW CORNING CORPORATION,

Debtor.

HEIDI LINDSEY, Representative of the Estate of Charlotte Mahum and Cheryl Kahn, *et al.*, UNSECURED CREDITORS' COMMITTEE OFFICIAL COMMITTEE OF TORT CLAIMANTS, *et al.*,

Plaintiffs-Appellees,

—v.—

THE DOW CHEMICAL COMPANY (96-2005/2139); CORNING INCORPORATED (96-2008/2139); DOW CORNING CORPORATION (96-2009); MINNESOTA MINING AND MANUFACTURING COMPANY (96-2010); BAXTER HEALTHCARE CORPORATION (96-2011); MEDICAL ENGINEERING CORPORATION (96-2012); BRISTOL-MYERS SQUIBB COMPANY (96-2013),

Defendants-Appellants.

Randall L. Frank, Bay City, MI, Karen E. Evangelista, Shermeta, Chimko & Kilpatrick, Rochester Hills, MI, Dennis S. Meir, Kilpatrick & Cody, Atlanta, GA, Susan M. Cook, Lambert, Leser, Dahm, Giunta, Cook & Schmidt, Bay City, MI, Marion J. Mack, Trustee, Office of the United States Trustee, Detroit, MI, Marvin E. Frankel (argued and briefed), Kramer, Levin, Naftalis, Nessin, Kamin & Frankel, New York City, Lenard M. Parkins, Verner, Liipfert, Bernard, McPherson & Hand, Houston, TX, Russell Langford Munsch, Munsch, Hardt, Kopf, Harr & Dinan, Dallas, TX, John M. O'Quinn, O'Quinn, Kerensky, McAnnich & Laminack, Houston, TX, Deborah H. Sheffield, Richardson, Plowden, Grier & Howser, Columbia, SC, Christopher J. Walker, Markow, Walker, Reeves & Anderson, Ridgeland, MS, Delia Y. Robinson, Markow, Walker, Reeves & Anderson, Jackson, MS, Thomas D. Lambros, Bricker & Eckler, Cleveland, OH, Debra D. McCullough, Sherman & Sterling, New York City, Tommy Jacks, Mithoff & Jacks, Austin, TX, Edward Blizzard, Williams, Blizzard & McCarthy, Houston, TX, *for Tort Claimant, Official Committee of Tort Claimants in No. 96-2005.*

James C. Schroeder (briefed), Theresa A. Canaday (briefed), Herbert L. Zarov, Robert M. Dow, Jr., Mayer, Brown & Platt, Chicago, IL, *for Dow Chemical Company in Nos. 96-2005 and 96-2139.*

Dennis S. Meir, Kilpatrick & Cody, Atlanta, GA, Marvin E. Frankel (argued and briefed), Kramer, Levin, Naftalis, Nessin, Kamin & Frankel, New York City, Russell Langford Munsch, Munsch, Hardt, Kopf, Harr & Dinan, Dallas, TX, John M. O'Quinn, O'Quinn, Kerensky, McAnnich & Laminack, Houston, TX, Deborah H. Sheffield, Richardson, Plowden, Grier & Howser, Columbia, SC, Christopher J. Walker, Markow, Walker, Reeves & Anderson, Ridgeland, MS, Delia Y. Robinson, Markow, Walker, Reeves & Anderson, Jackson, MS, *for Tort Claimant, Official Committee of Tort Claimants in Nos. 96-2008 to 96-2013.*

Sheryl L. Toby, Michael J. Friedman, Honigman, Miller, Schwartz & Cohn, Detroit, MI, Ogden N. Lewis, Davis, Polk & Wardwell, New York City, *for Unsecured Creditors' Committee in Nos. 96-2008 to 96-2013.*

William D. Eggers, Nixon, Hargrave, Devans & Doyle, Rochester, NY, *for Corning Incorporated in Nos. 96-2008 and 96-2139.*

Barbara J. Houser (argued), George H. Tarpley, Sheinfeld, Maley & Kay, Dallas, TX, *for Dow Corning Corporation in No. 96-2009.*

Greg A. Danilow (briefed), Bruce R. Zirinsky (argued and briefed), Howard B. Comet (briefed), Weil, Gotshal & Manges, New York City, Susan Healy Zitterman, John P. Hessburg, Kitch, Drutchas, Wagner & Kermey, Detroit, MI, *for Minnesota Mining and Manufacturing Company in No. 96-2010.*

Larry J. Nyhan, James F. Conlan, Sidley & Austin, Chicago, IL, Judy A. O'Neill, Laura J. Eisele, Dylrema Gossett, Detroit, MI, Thomas E. Pitts, Jr. (argued and briefed), Sidley & Austin, New York City, *for Baxter Healthcare Corporation in No. 96-2011.*

Hayden Smith, Jr. (briefed), David J. Adler, McCarter & English, Newark, NJ, *for Medical Engineering Corporation in No. 96-2012.*

Hayden Smith, Jr. (briefed), David J. Adler, McCarter & English, Newark, NJ, *for Bristol-Myers Squibb Company in No. 96-2013.*

Michael J. Friedman, Honigman, Miller, Schwartz & Cohn, Detroit, MI, Randall L. Frank, Bay City, MI, Karen E. Evangelista, Shermeta, Chimko & Kilpatrick, Rochester Hills, MI, Dennis S. Meir, Kilpatrick & Cody, Atlanta, GA, Susan M. Cook, Lambert, Leser, Dahm, Ginata, Cook & Schmidt, Bay City, MI, Marion J. Mack, Trustee, Office of the United States Trustee, Detroit, MI, Marvin E. Frankel (argued and briefed), Kramer, Levin, Naftlis, Nessin, Kamin & Frankel, New York City, Lenard M. Parkins, Verner, Liipfert, Bernard, McPherson & Hand, Houston, TX, Russell Langford Munsch, Munsch, Hardt, Kopf, Harr & Dinan, Dallas, TX, John M.

O'Quinn, O'Quinn, Kerensky, McAnnich & Laminack, Houston, TX, Deborah H. Sheffield, Richardson, Plowden, Grier & Howser, Columbia, SC, Delia Y. Robinson, Markow, Walker, Reeves & Anderson, Jackson, MS, Thomas I. Lambros, Bricker & Eckler, Cleveland, OH, Debra D. McCullough, Sherman & Sterling, New York City, Tommy Jacks, Mithoff & Jacks, Austin, TX, Edward Blizzard, Williams, Blizzard & McCarthy, Houston, TX, *for Tort Claimant, Official Committee of Tort Claimants in No. 96-2139.*

Ogden N. Lewis, Davis, Polk & Wardwell, New York City, *for Unsecured Creditors' Committee in No. 96-2139.*

Before: MARTIN, *Chief Judge*; BATCHELDER, *Circuit Judge*; WISEMAN,* *District Judge.*

BOYCE F. MARTIN, JR., *Chief Judge.*

Before the Court is an appeal and petition for writ of mandamus by Dow Corning; its shareholders, The Dow Chemical Company and Corning Incorporated; and other manufacturers of silicone products that have been named as co-defendants with Dow Corning in product liability suits relating to silicone implants.[1] These parties contest the district court's denial of their motion to transfer to the Eastern District of Michigan breast-implant claims brought in various jurisdictions by claimants who have chosen not to join the global settlement pool. The district court, upon remand from this Court, exercised discretionary and mandatory abstention in declin-

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* The Honorable Thomas A. Wiseman, Ir., United States District Judge for the Middle District of Tennessee, sitting by designation.

[1] These co-defendants include Baxter International Inc. (Baxter); Minnesota Mining and Manufacturing (3M); Bristol-Myers Squibb Co. (Bristol-Myers); and Medical Engineering Corp. (MEC).

ing to transfer the claims against the shareholders and the co-defendants. For the reasons stated herein, we issue a writ of mandamus ordering the district court to transfer the claims against the shareholders to the Eastern District of Michigan and to evaluate each claim individually to determine whether mandatory abstention applies.

This case concerns yet another chapter in "one of the world's largest mass tort litigations." In re Dow Corning Corp., 86 F.3d 482, 486 (6th Cir.1996), cert. denied, ___ U.S. ___, 117 S.Ct. 718, 136 L.Ed.2d 636 (1997). Thousands of product liability claims arising from Dow Corning's manufacture and sale of silicone products have been filed against Dow Corning and its shareholders. The threatened consequences of these claims prompted Dow Corning to file a petition for reorganization under Chapter 11 of the Bankruptcy Code. Dow Corning, joined by its shareholders, subsequently filed a motion to transfer the claims pending against them to the Eastern District of Michigan. The company envisioned its motion was the first step in ensuing a feasible plan of reorganization, and indicated that it would seek to have the transferred actions consolidated for a threshold jury trial on the issue of whether silicone gel breast implants cause the diseases claimed." Id. at 486. Citing potential claims for contribution against Dow Corning, the nondebtor manufacturers—Baxter, 3M, Bristol-Myers, and MEC—also moved to transfer the claims in which they were named as co-defendants with Dow Corning. The district court granted Dow Corning's motion to transfer, but denied, on jurisdictional grounds, the motion as it related to the shareholders and the motions of the nondebtor manufacturers.

In In re Dow Corning Corp., 86 F.3d at 482, this Court reversed and held that the Eastern District of Michigan had "related to" jurisdiction over breast-implant claims against not only the debtor, Dow Corning, but also its shareholders and certain other nondebtor defendants. We further held that 28 U.S.C. § 157(b)(5) granted the district court authority to transfer the cases against the nondebtors to the Eastern District of Michigan. In so doing, we recognized the interest

of all parties, including the tort claimants, in preventing unnecessary depletion of Dow Corning's assets. We further acknowledged that the risk to the debtor's estate would be substantially enhanced "if the claims against Dow Chemical and Corning Incorporated are allowed to proceed separately" from those against Dow Corning. Id. at 495. After outlining the risks to Dow Corning's estate, we remanded to the district court with instructions "to determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of bankruptcy cases." Id. at 497 (quoting In re Salem Mortgage Co., 783 F.2d 626, 635 (6th Cir.1986)). Despite our clear articulation of the risks to Dow Corning's estate and our call for individualized abstention determinations, the district court, without benefit of a hearing and without analysis of any individual claim, globally abstained from the cases against the shareholders.

The Official Committee of Tort Claimants initially contend that we are without jurisdiction to review the district court's decision. Indeed, Congress has significantly curtailed the courts of appeals' ability to review a district court's decision to exercise mandatory or discretionary abstention under 28 U.S.C. 1334(c)(1), (2). Section 1334(d) provides:

> Any decision to abstain or not to abstain made under this subsection (other than a decision not to [exercise mandatory abstention]) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. . . .

28 U.S.C. § 1334(d). However, we conclude for two reasons that we have jurisdiction in mandamus to review the district court's decision.

First, this is not the ordinary situation in which the district court, either on motion of a party or on its own motion, determines that abstention under 28 U.S.C. § 1334(c) is appropriate. Rather, the district court was instructed by this Court, in an order remanding this matter for the explicit purpose of determining whether abstention was proper, to undertake a

case-by-case review of these tort claims and to determine, as to each case, whether to abstain. The district court did not comply with our order of remand. The issuance of a writ of mandamus is therefore necessary and appropriate to require the district court to conduct the abstention analysis in strict compliance with the requirements of § 1334 and our order of remand.

Second, § 1334(d) does not mention this Court's ability to review such determinations pursuant to our mandamus authority under 28 U.S.C. § 1651. Thus, recognizing the familiar maxim "expressio unius est exclusio alterius"—i.e., the expression of one is the exclusion of others—we conclude that our power to review a district court's abstention determination under 1334(c)(1) or (2), other than a decision not to abstain under 1334(c)(2), is limited to those rare cases when mandamus review is justified; that is, when the case " 'presents questions of unusual importance necessary to the economical and efficient administration of justice.' " EEOC v. K-Mart Corp., 694 F.2d 1055 (6th Cir.1982). Because of the significant risk posed to Dow Corning's estate by the multiforum breast-implant litigation, this case is one of those rare instances where mandamus relief is appropriate.

In In re Bendectin Prods. Liab. Litig., 749 F.2d 300, 304 (6th Cir.1984), we identified criteria for judging whether issuance of a writ of mandamus is appropriate. These guidelines include: (1) the party seeking mandamus will be damaged or prejudiced and has no other means of obtaining relief; (2) the district court's error is clearly erroneous as a matter of law; (3) the district court's order is an oft-repeated error; and (4) the district court's order raises important issues of first impression. Id.; see also In re Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union, Local No. 173, 983 F.2d 725, 727 (6th Cir. 1993). Although all of the factors may not point toward issuance of a writ, mandamus relief is still appropriate "if the other factors clearly warrant it." In re Glass Workers, 983 F.2d at 727. In this case, the balance of these factors indicate that issuance of a writ of mandamus is appropriate.

The first and fourth factors are clearly met. Dow Corning and its shareholders will be harmed if the writ is not issued, and § 1334(d)'s direct appeal prohibition renders a writ of mandamus their only avenue of relief. This case also presents extremely important issues that have not been addressed by this Court.

Moreover, the district court's clear error is equally apparent. The order of remand required the district court to make a case-by-case determination of whether, in light of the findings contained in the order of remand, abstention was statutorily mandated or appropriate as a matter of discretion, and Dow Corning and its shareholders were entitled to have that order followed. Instead, completely disregarding those findings, the district court made a blanket determination that mandatory abstention under § 1334(c)(2) was appropriate, and in the alternative, held that it would exercise discretionary abstention to avoid transfer of the shareholders' claims to the Eastern District of Michigan. Both determinations were fraught with clear error.

The mandatory abstention provision in § 1334(c)(2) provides:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

Thus, for mandatory abstention to apply to a particular proceeding, there must be a timely motion by a party to that proceeding, and the proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudica-

tion; and (5) be a non-core proceeding. In re Dow Corning, 86 F.3d at 497.

The district court's decision applying mandatory abstention to the proceedings against the shareholders is, in generous terms, inadequate. The requirements for mandatory abstention dictate that each case must be examined individually. The district court, in its three-page discussion of mandatory abstention, failed to make the necessary case-by-case inquiry. No hearing was conducted, and no evidence was accepted by the district court. It is undisputed that some of the cases do not meet the requirements of mandatory abstention. Indeed, in many of the cases, there does not even appear to have been a motion for abstention filed by the plaintiff in the proceeding. Moreover, the number of cases requiring mandatory abstention is impossible for us to determine because of the paucity of evidence on the record. Thus, the district court's decision employing § 1334(c) to abstain globally without examination of a single individual claim cannot stand.

The district court's exercise of discretionary abstention is equally troubling. Section 1334(c)(1) provides, in relevant part:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with state courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1334(c)(1).

As an initial matter, it makes little practical sense to transfer the claims against Dow Corning while refusing to transfer those against the shareholders. The claims against the shareholders arise from an identical set of facts and are merely duplicates of those against Dow Corning. The shareholders have never manufactured a silicone-implant product and are only named in the suits because of their association with Dow Corning. Thus, the actions against Dow Corning's shareholders are essentially the same exact cases that have already

been transferred to the Eastern District of Michigan. The district court's decision to transfer only the claims against Dow Corning basically expanded an already overwhelming litigation burden.

Aside from the impracticality of the district court's decision to exercise discretionary abstention, its legal rationale is wholly inadequate. The district court did not examine a single tort claim to determine whether discretionary abstention was appropriate in the interests of justice and comity. The district court briefly mentioned principles of federalism and comity, as well as the state law nature of the claims, as bases for discretionary abstention. Although the cases are premised on state law, the district court did not indicate why the state law nature of the claims justified discretionary abstention; indeed, it appears that it does not. The district court ignored the fact that at least some of the claims have an independent basis for jurisdiction in federal court. Moreover, there is no suggestion that the state law issues in these cases are unique, unsettled, or difficult. See General Am. Communications Corp. v. Landsell (In re General Am. Communications Corp.), 130 B.R. 136, 146 (S.D.N.Y.1991) ("Given the genesis of section 1334(c)(1), it is not surprising that the primary determinant for the exercise of discretionary abstention is whether there exists unsettled questions of state law."); see also In re Pan Am. Corp., 950 F.2d 839, 845 (2d Cir.1991). Thus, the principles of federalism and comity would not be violated by the district court's assumption of jurisdiction over these cases. The breast implant litigation truly is a nationwide issue, and no state has a paramount interest in the litigation.

The district court also overlooked the risks to Dow Corning's estate that were clearly articulated in our prior decision. Failing to transfer the claims against the shareholders will likely affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization. As we noted in In re Dow Corning Corp., 86 F.3d 482, 493 (6th Cir.1996), cert. denied, ___ U.S. ___, 117

S.Ct. 718, 136 L.Ed.2d 636 (1997), "Dow Chemical and Corning Incorporated have already asserted cross-claims against each other and Dow Corning in the underlying litigation." Moreover, the shareholders share joint insurance coverage with Dow Corning. We acknowledged in our prior decision that "certain of the policies cover defense expenses, and those costs alone may significantly reduce the pool of coverage available to Dow Corning if the claims pending against Dow Chemical and Corning Inc. are allowed to proceed separately. " Id. at 495. Therefore, contrary to the district court's determination, the substantial risks identified in our prior decision indicate that the cases against the shareholders should be transferred in the interest of justice.

The district court, without a hearing or the presentation of additional evidence, ignored this Court's examination of the evidence and made a conclusory finding to the contrary. We nevertheless find that our prior examination of the record was correct and that the district court's determinations are without support. Thus, because the district court clearly erred in making its abstention determinations, issuance of a writ of mandamus is appropriate in this case.[2]

We further find that discretionary abstention from the cases against the shareholders is wholly inappropriate in this case. In our prior decision, we acknowledged the significant impact that our resolution of these issues will have on the future course of this litigation. We also recognized that perfect satisfaction of all interests was impossible. Armed with that realization, we set out to meet the goal of establishing "a mechanism for resolving the claims at issue in the most fair and equitable manner possible." Id. at 487. This goal was

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[2] The district court also relied on 11 U.S.C. § 524(e) to justify its decision to exercise discretionary abstention. This reliance is puzzling. Section 524(e) provides that the liability of a nondebtor is not affected by the discharge of that liability with respect to the debtor. No nondebtor is seeking a discharge of their debt in the Eastern District of Michigan, and no nondebtor has argued that a discharge of the debtor's debts should have any affect on their obligations or liabilities to the claimants in these cases. Thus, § 524 is completely irrelevant to this case.

to be attained by balancing the following often-competing interests:

> those of the individuals who have brought and will bring breast implant claims; Dow Corning's interests with regard to its attempt to formulate a successful reorganization plan; Dow Chemical and Corning Incorporated's interests as shareholders of Dow Corning; and the judicial system's interest in allocating its limited resources effectively and efficiently.

Id.

The latter three interests clearly will be served by transferring the claims against the shareholders to the Eastern District of Michigan. The claimant's interests—presumably preserving the assets of Dow Corning's estate and receiving quick adjudication of their claims—will also be accomplished through such a transfer. Thus, with regard to the cases brought by claimants choosing not to join the global settlement pool, we have reached a crossroads. Dow Corning's assets are finite and risk being unnecessarily diminished by the expense of litigating thousands of breast-implant claims in innumerable jurisdictions. We therefore believe that transferring these claims to a single jurisdiction is the only way to achieve an efficient resolution to this litigation, the development of a successful reorganization plan, and the adequate compensation of deserving claimants.

Accordingly, we issue a writ of mandamus ordering the district court to transfer the claims against Dow Chemical and Corning Incorporated to the Eastern District of Michigan. Once transfer has been accomplished, the cases should be indexed and cross referenced so that, in any proceeding in which a motion for abstention is filed, the district court may make the required abstention determinations and adequately state its reasoning as to each such proceeding. Because we find it unnecessary to transfer any other pending proceedings to the district court at this time, we deny the nondebtor manufacturers' petition for writ of mandamus.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 95-CV-72397-DT

In Re:

DOW CORNING CORPORATION,

Debtor.

HON. DENISE PAGE HOOD

MEMORANDUM OPINION AND ORDER ON REMAND REGARDING SECTION 1334(C) ABSTENTION

I. *INTRODUCTION:*

This matter is before the Court on remand from the United States Court of Appeals for the Sixth Circuit. *In re: Dow Corning Corporation*, Nos. 95-2034/2082/2084/2106/2107, 86 F.3d 482 (6th Cir. 1996)(Amended). This Court previously entered an order finding that it did not have subject matter jurisdiction over the tort claims against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit reversed this Court's determination on this issue and found

that this Court had subject matter jurisdiction over the tort claims pending against the nondebtor defendants pursuant to 28 U.S.C. § 157(b)(5). The Sixth Circuit remanded this case on the issue of whether or not this Court should abstain from the tort claims against the nondebtors pursuant to 28 U.S.C. § 1334(c)(1) and/or (2).

II. *ANALYSIS:*

A. *Whether this Court must abstain or, alternatively, exercise its discretion to abstain pursuant to 28 U.S.C. § 1334(c).*

1. *Mandatory Abstention*

The Sixth Circuit has concluded that this Court has "related to" jurisdiction pursuant to 28 U.S.C. § 1334(b) over the actions pending against the nondebtors Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter, and Bristol-Myers Squibb in nonbankruptcy forums nationwide. *In re Dow Corning Corp.*, *supra* at 494. In a section 157(b)(5) motion, an abstention analysis is required. *In re Pan American Corp.*, 95O F.2d, 839, 844 (2nd Cir. 1991); *In re Dow Corning Corp.*, *supra* at 497. The Tort Claimants' briefs and other claimants' objections and responses to the nondebtors' motions under Section 157(b)(5) requested this Court to abstain under 28 U.S.C. § 1334(c).

Section 1334(c) qualifies Section 1334(b)'s broad grant of jurisdiction. *In re Dow Corning Corp.* at 497. There are two types of abstention under Section 1334(c): discretionary abstention under 28 U.S.C. § 1334(c)(1) and mandatory abstention under 28 U.S.C. § 1334(c)(2). *Id.* Mandatory abstention will be addressed first.

In order for mandatory abstention to apply, a proceeding must: 1) be based on a state law claim or cause of action; 2) lack a federal jurisdictional basis absent the bankruptcy; 3) be commenced in a state forum of appropriate jurisdiction; 4) be

capable of timely adjudication; and 5) be a non-core proceeding. *Id.*

As to the first factor, the claims and causes of action at issue against the nondebtors are personal injury tort claims which are essentially state law claims. Addressing the second factor, this Court notes that the Sixth Circuit held that this Court has "related to" bankruptcy jurisdiction over the nondebtors. The personal injury tort actions against the nondebtors are not proceedings which need a determination under the bankruptcy laws and do not arise in a bankruptcy case. Absent the bankruptcy of the debtor in this matter, this Court would lack federal jurisdiction over the actions against the nondebtors.[1] With respect to the third factor, there have been no allegations that the actions against the nondebtors have not been commenced in a state forum of appropriate jurisdiction. Satisfying the fourth factor, the parties have informed the Court that there are numerous cases ready for trial against the nondebtors. Furthermore, the Honorable Sam C. Pointer, Jr. in his March 19, 1996 (Order 29) and April 16, 1996 (Order 29B) orders and the Multidistrict Litigation Panel's April 10, 1996 Conditional Remand Order, indicate there are numerous cases against the nondebtors which are indeed ready for trial.

Considering the fifth factor, the Court must determine whether the actions against the nondebtors are non-core proceedings. There are two categories of core proceedings: proceedings "arising under" title 11 and proceedings "arising in" title 11. *In re Harris Pine Mills*, 44 F.3d 1431, 1435 (9th

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[1] The only cases against the nondebtors over which this Court would have jurisdiction, sitting in the Eastern District of Michigan, are those cases that involve complete diversity. The Court notes that most of the cases involving the nondebtors also include the Debtor Dow Corning Corporation which would defeat this Court's diversity jurisdiction. (*See* the Court's Discretionary Abstention analysis, *infra.*) The Court notes that mandatory abstention also apply to removed cases. *William v. Shell Oil Co.*, 169 B.R. 684, 690-691 (S.D. Cal. 1994). The Court further notes that absent the bankruptcy, the Court has no jurisdiction over the cases against the nondebtors where the claims arose outside of the Eastern District of Michigan.

Cir. 1995), *cert. denied*, 115 S.Ct. 2555 (1995). Proceedings "arising under" title 11 "involve a cause of action created or determined by the statutory provision of title 11." *Id.* Proceedings "arising in" title 11 are a reference to those "administrative" matters that arise only in bankruptcy cases and are not based on any right expressly created by title 11, but nevertheless, would have no existence outside of the bankruptcy. *Id.* Section 157(b)(2) provides a nonexclusive list of proceedings which are core proceedings. Non-core proceedings are only "related to" a case under title 11. *Id.* at 1435. A non-core proceeding "does not invoke a substantive right created by the federal bankruptcy law and is one that could exist outside of bankruptcy." *Id.*

Personal injury tort or wrongful death claims are excluded from the catalog of core proceedings by 28 U.S.C. § 157(b)(2)(B) and (O) which state in pertinent part:

> (b)(2) Core proceedings include, but are not limited to—
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> * * *
>
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 *but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;*
>
> * * *
>
> (O) other proceedings affecting the liquidation of assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, *except personal injury tort or wrongful death claims.*

28 U.S.C. § 157(b)(2)(B) and (O) (emphasis added). *In re Hughes*, 98 B.R. 115, 118 (D.C. 1988). The actions against the nondebtor defendants are non-core proceedings under 28 U.S.C. § 157.

Section 157(b)(4) provides that "[n]on-core proceedings under § 157(b)(2)(B) of title 28 [liquidation of personal injury tort or wrongful death cases], shall *not* be subject to the mandatory abstention provisions of Section 1334(c)(2)." *In re Pan Am*, 950 F.2d at 845; 28 U.S.C. § 157(b)(4). As indicated above, the non-core proceedings included in Section 157(b)(2)(B) are "liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims *against the estate* for purposes of distribution in a case under title 11." (Emphasis added). Here, the personal injury and/or wrongful death tort actions are *not* "against the estate" of the debtor but against the nondebtors. Consequently, the non-core proceedings and actions against the nondebtors are *not* exempt from mandatory abstention under Section 157(b)(4). Moreover, 28 U.S.C. § 1334(c)(2) provides for mandatory abstention in cases involving state law claims for which the sole basis of bankruptcy jurisdiction is "related to" jurisdiction. *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1506, note 10 (1995)(Stevens, J., dissenting). In the instant case, the Sixth Circuit held that this Court had Section 1334(b) or "related to" jurisdiction over the actions pending against the nondebtors in nonbankruptcy forums nationwide. *In re Dow Corning*, *supra* at 494. Based on the above, the Court finds that the four factors calling for mandatory exemption under Section 1334(c)(2) have been met.

2. *Discretionary Abstention.*

Alternatively, the Court exercises its discretion to remand pursuant to 28 U.S.C. § 1334(c)(1). Section 1334(c)(1) provides:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

In *In re White Motor Credit*, 761 F.2d 270 (1985), the Sixth Circuit noted:

> . . . federal courts should be hesitant to exercise jurisdiction when state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought.

Id. at 274 (quotations omitted). Here, the personal injury/tort claims against the nondebtors are predominantly state law claims. The proof and scope of issues in dispute and the comprehensiveness of the remedies sought varies state to state. The Sixth Circuit in *In re White Motor* further noted that:

> . . . in large bankruptcy cases with hundreds or even thousands of tort litigants beating on the door of one federal judge, . . . at least judicial economy and expeditiousness, may depend on the court's authority to refer cases to other courts. Since the 1984 Bankruptcy Act prevents reference of these tort cases to bankruptcy courts, as in the past, it makes good sense to give the district courts wide latitude in referring the cases through abstention to other courts.

Id. The Court finds that discretionary abstention from the cases against the nondebtors would best serve the interest of justice and comity. Waiting until the estimation and confirmation of a plan of reorganization before the actions against the nondebtors are liquidated would not result in a more precise estimation of the assets needed by the debtor's estate to cover any indemnification and contribution claims against the debtor's estate. The estimation of any possible indemnification and contribution claims by the nondebtors against the debtor's bankruptcy estate would not be any different than if the cases against the nondebtors proceed to trial at this stage. To the contrary, as the various trials proceed against the nondebtors, a clearer picture would emerge as to whether the nondebtors would have any indemnification or contribution claims against the debtor's estate.

The Sixth Circuit opinion addresses the Joint Insurance issue between Dow Corning, Dow Chemical and Corning

Incorporated finding that the Court had "related to" jurisdiction based on the Joint Insurance between the parties. The Sixth Circuit opinion does not address the Joint Insurance issue as it pertains to the abstention issue. This Court addresses this issue as it relates to the interest of justice and comity issues which must be addressed in an analysis of discretionary abstention. Although Dow Chemical has apparently notified insurers that it is asserting claims against the jointly-held policies, it has been argued that as to Dow Chemical, the joint policies are in fact excess policies and that Dow Chemical has sufficient primary insurance. (Ex. A, p. 5, Official Committee of Tort Claimants' Brief, filed June 7, 1996). The Sixth Circuit's opinion addresses the insurance issue from the point of view of whether the Debtor's estate will have sufficient resources. The Debtor itself has not put forth proof that its estate would be dissipated based upon the "threat" posed to those insurance policies by Dow Chemical and Corning Incorporated. In *The Matter of Zale Corp.*, 62 F.3d 746 (5th Cir. 1995), the Fifth Circuit found that even if the bankruptcy court had "related to" jurisdiction over certain insurance policies with indemnification contracts, a nondebtor should not be shielded by the powers of the bankruptcy court. *Id.* at 760-761. The Bankruptcy Code discharges the Debtor's liabilities and not those owed by third parties. *Id.* at 760, notes 42, 43, and 44; 11 U.S.C. § 524(e). If the Court does not abstain from the tort claims against the nondebtors, the tort claims against the nondebtors would effectively be determined by this Court which would be contrary to 11 U.S.C. § 524(e). Section 524(e) does not allow the Bankruptcy Code to be used to discharge the debts of nondebtors. *Id.*, at 760, notes 42, 43, and 44. The Court finds that the "threat" posed to the insurance policies by the nondebtors does not overcome factors in favor of discretionary abstention. Specifically, the Court finds the interests of justice and comity weigh in favor of discretionary abstention.

III. *CONCLUSION:*

This Court finds that the cases against the nondebtors are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2). Alternatively, the Court finds that in the interest of justice, comity and judicial economy, it will exercise its discretion to abstain from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1).

Accordingly,

IT IS ORDERED that the actions against the nondebtor defendants are subject to mandatory abstention under 28 U.S.C. § 1334(c)(2); alternatively,

IT IS ORDERED that the Court will exercise its discretion to ABSTAIN from the cases against the nondebtors under 28 U.S.C. § 1334(c)(1).

DATED: JUL 30 1996

/s/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.

Nos. 95-2034, 95-2082, 95-2084,
95-2106, and 95-2107.
Argued March 5, 1996.
Decided April 9, 1996.

In re DOW CORNING CORPORATION,

Debtor.

HEIDI LINDSEY, *et al.*: Official Committee
of Tort Claimants, *et al.*,

Plaintiffs-Appellees,

—v.—

O'BRIEN, TANSKI, TANZER AND YOUNG HEALTH
CARE PROVIDERS OF CONNECTICUT, *et al.*,

Defendants,

Dow Corning Corporation; The Dow Chemical Company (95-2034/2107); Corning Inc. (95-2107); Baxter Healthcare Corporation; Baxter International Inc. (95-2082); Minnesota Mining and Manufacturing Co. (95-2084); Bristol-Myers Squibb Co.; Medical Engineering Corporation (95-2106),

Defendants-Appellants.

Before:

MARTIN and BATCHELDER, *Circuit Judges*
WISEMAN, *District Judge*.*

AMENDED OPINION

BOYCE MARTIN, JR., *Circuit Judge*.

This is an appeal to determine the subject matter jurisdiction of federal district courts, sitting as bankruptcy courts, over proceedings "related to" a case filed under Chapter 11 of the Bankruptcy Code, and the ability of federal district courts to transfer such proceedings to the district court in which the bankruptcy case is pending. The principal issue presented is whether the district court erred, as a matter of law, in its determination that claims for compensatory and punitive damages asserted in tens of thousands of actions against numerous nondebtor manufacturers and suppliers of silicone gel breast implants could have no conceivable effect upon, and therefore were not related to, the bankruptcy estate of The Dow Corning Corporation. The district court held that it did not have "related to" jurisdiction over those claims pursuant to 28 U.S.C. § 1334(b) and concluded that they could not be transferred to it pursuant to 28 U.S.C. § 157(b)(5). For the following reasons, we REVERSE and REMAND for further proceedings consistent with this opinion.[1]

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* The Honorable Thomas A. Wiseman, Jr., Senior United States District Judge for the Middle District of Tennessee, sitting by designation.

[1] In this amended opinion, we adhere to our April 9, 1996 decision in this case, but seek to clarify the scope of our ruling and the impact we intend it to have. The opinion is therefore amended and reissued as follows.

I.

Until it ceased their manufacture in 1992, Dow Corning was the predominant producer of silicone gel breast implants, accounting for nearly 50% of the entire market. In addition, Dow Corning supplied silicone raw materials to other manufacturers of silicone gel breast implants. In recent years, tens of thousands of implant recipients have sued Dow Corning, claiming to have been injured by autoimmune reactions to the silicone in their implants. Dow Chemical Company, Corning Incorporated, Minnesota Mining and Manufacturing Company, Baxter Healthcare Corporation and Baxter International Incorporated,[2] and Bristol-Myers Squibb Company and Medical Engineering Corporation[3] are other manufacturers and suppliers of silicone gel-filled implants, and are codefendants with Dow Corning in a large number of personal injury actions.

On June 25, 1992, prior to Dow Corning's filing of its Chapter 11 petition, the Federal Judicial Panel on Multidistrict Litigation ordered the consolidation of all breast implant actions pending in federal courts for coordinated pretrial proceedings, and transferred those actions to Chief Judge Pointer of the Northern District of Alabama. On September 1, 1994, Chief Judge Pointer certified a class for settlement purposes only, and approved a complex agreement between members of the class and certain defendants that contemplated the creation of a $4.25 billion fund to cover, among other things, the costs of treatment and other expenses incurred by breast implant recipients. Each class member was given the opportunity to opt out of the class and to pursue her individual claims separately. Several thousand plaintiffs opted out of the

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[2] Baxter never designed, manufactured, or marketed breast implants, but is a defendant in personal injury actions as a result of certain corporate acquisitions and mergers. The Baxter implants were actually made by The Heyer-Schulte Company.

[3] The Bristol-Myers Squibb implants were made by a subsidiary, The Medical Engineering Corporation.

settlement class, while approximately 440,000 elected to register for inclusion in the Global Settlement.[4]

Due to the litigation burden imposed by what is one of the world's largest mass tort litigations, and the threatened consequences of the thousands of product liability claims arising from its manufacture and sale of silicone breast implants and silicone gel, Dow Corning filed a petition for reorganization under Chapter 11 of the Bankruptcy Code on May 15, 1995, in the United States District Court for the Eastern District of Michigan. The district court had jurisdiction over that proceeding pursuant to 28 U.S.C. § 1334(a). As a result of Dow Corning's Chapter 11 filing, all breast implant claims against it were automatically stayed pursuant to 11 U.S.C. § 362(a). Claims against Dow Corning's two shareholders, Dow Chemical and Corning Incorporated, and the other nondebtor defendants were not stayed. Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter and Bristol-Myers Squibb subsequently removed many opt-out claims in which those companies were named defendants with Dow Corning from state to federal court pursuant to 28 U.S.C. § 1452(a).

On June 12, 1995, Dow Corning filed a motion pursuant to 28 U.S.C. § 157(b)(5)[5] to transfer to the Eastern District of Michigan opt-out breast implant claims pending against it and its shareholders, Dow Chemical and Corning Incorporated.[6] Dow Corning's motion covered claims that had been

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[4] It has since become clear that the original Global Settlement will not hold together because the sums provided are inadequate to fund the claims filed by over 100,000 plaintiffs. Unless a modified settlement is reached, thousands of opt-in plaintiffs and thousands of claimants who have yet to file actions are likely to file or reactivate individual suits against the breast implant defendants in both state and federal courts.

[5] Title 28 U.S.C. § 157(b)(5) states: "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending."

[6] Dow Corning's motion sought a transfer of lawsuits against it and its shareholders which were not part of the global settlement. Dow

removed to federal court and were pending in the multidistrict forum, as well as claims pending in state courts which were in the process of being removed to federal courts pursuant to 28 U.S.C. § 1452(a). Dow Corning envisioned its transfer motion as the first step in ensuring a feasible plan of reorganization, and indicated that it would seek to have the transferred actions consolidated for a threshold jury trial on the issue of whether silicone gel breast implants cause the diseases claimed. Dow Chemical and Corning Incorporated joined in Dow Corning's motion.

On June 14, 1995, Minnesota Mining, Baxter, and Bristol-Myers Squibb also moved, pursuant to Section 157(b)(5), to transfer to the Eastern District of Michigan the opt-out cases in which those manufacturers, were named as defendants with Dow Corning.[7] In their Section 157(b)(5) motions, Minnesota

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Corning. Dow Chemical and Corning have stated that "[t]housands of the suits against Dow Corning have included claims against Dow Chemical and Corning, even though neither of those companies designed, manufactured, tested, or sold breast implants." Brief for Dow Corning Corporation, The Dow Chemical Company, and Corning Incorporated at 9. The companies have explained that "[p]laintitfs have generally alleged that the Shareholders are liable for Dow Corning's acts because they purportedly (1) negligently undertook Dow Corning's duties in connection with Dow Corning's products, (2) aided and abetted Dow Corning's manufacture and sale of unsafe products, or (3) conspired with Dow Corning in the sale by Dow Corning of unsafe or inadequately tested products." Id. at 9-10. Dow Corning's transfer motion covered about one-third of the breast implant claims brought by opt-out plaintiffs against Dow Corning.

[7] The Minnesota Mining, Baxter, and Bristol-Myers Squibb motions were limited to personal injury actions in which Dow Corning was a named codefendant with one or more of those parties and the plaintiffs had opted out of the Global Settlement. According to Minnesota Mining, "when [Dow Corning] filed for chapter 11, [it] was a codefendant with [Minnesota Mining] in approximately 75% of implant cases against [Minnesota Mining] . . . [i]n virtually every case, plaintiffs asserted claims of joint and several liability against [Minnesota Mining] and [Dow Corning] for the full amount of their asserted damages. Additionally, approximately 60% of the cases against [Minnesota Mining] involved plaintiffs who had received multiple sets of breast implants, in separate operations, including implants made by [Minnesota Mining] and at least one other manufacturer, which in most cases

Mining, Baxter, and Bristol-Myers Squibb also asked the district court to order that the claims at issue be transferred to the district court in which the bankruptcy case is pending so that the court could conduct a consolidated trial on the issue of causation.

On September 12, 1995, the district court issued two opinions and companion orders regarding the Section 157(b)(5) transfer motions. With respect to opt-out breast implant cases pending against Dow Corning, the district court asserted jurisdiction under Section 1334(b) and permitted transfer pursuant to Section 157(b)(5). The district court, however, denied the remainder of the transfer motions on the ground that, as a matter of law, it lacked subject matter jurisdiction over the claims sought to be transferred because they were not "related to" Dow Corning's bankruptcy proceeding pursuant to 28 U.S.C. § 1334(b). In denying the transfer motions, the district court also directed that individual federal courts nationwide dismiss or sever Dow Corning and/ or remand the combined opt-out actions to state court, and enjoined the nondebtor codefendants from removing any other cases from state to federal court pursuant to 28 U.S.C. § 1452 if the only basis for such removal was 28 U.S.C. § 1334(b) or 28 U.S.C. § 1367(a). In a September 14, 1995 order, the district court extended its rulings to include opt-in breast implant claims.

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included [Dow Corning]." Brief for Minnesota Mining and Manufacturing Company at 6. The Baxter motion "covered personal injury actions in which both the Debtor and Baxter were named defendants and the plaintiff had opted out of the Global Settlement." Brief for Baxter Healthcare Corporation and Baxter International Inc. at 3. Baxter has stated that the actions in which "both the Debtor and Baxter are defendants number more than 5,000 . . . in most of which the Debtor and Baxter are alleged to be joint tortfeasors and jointly and severally liable for the damages asserted." Id. at 9. Bristol-Myers Squibb motion explained that the company sought to have the district court transfer the opt-out cases in which it was a named codefendant with Dow Corning. Brief for Bristol-Myers Squibb Company and Medical Engineering Corporation at 5. The Minnesota Mining, Baxter. and Bristol-Myers Squibb motions covered approximately two-thirds of the breast implant claims asserted by opt-out plaintiffs against Dow Corning.

Dow Corning, Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter, and Bristol-Myers Squibb subsequently filed appeals seeking review of the district court's partial denial of their motions to transfer. Those appeals were consolidated on October 10, 1995, and we are now faced with a complex set of questions pertaining to the scope of a district court's jurisdiction when it sits in bankruptcy, and its power to fix venue for the trial of wrongful death and personal injury tort claims that are "related to" a bankruptcy proceeding. In addressing these issues, we begin, as we do in any case involving a question of statutory construction, with the express language of the statute at issue and an examination of Congressional intent. In addition, we recognize that our decision will significantly impact the future course of this massive litigation. Realizing that we cannot satisfy all competing interests perfectly, our primary goal is to establish a mechanism for resolving the claims at issue in the most fair and equitable manner possible. In seeking to achieve that goal, we are called upon to balance four different, and frequently competing, interests: those of the individuals who have brought and will bring breast implant claims; Dow Corning's interests with regard to its attempt to formulate a successful reorganization plan; Dow Chemical and Corning Incorporated's interests as shareholders of Dow Corning; and the judicial system's interest in allocating its limited resources effectively and efficiently.

II.

As a threshold matter, we must determine whether the district court's partial denial of the motions to transfer is immediately appealable. These issues are certainly fluid. Our general jurisdiction to review a decision or order of a district court sitting in bankruptcy is governed by 28 U.S.C. § 1291. *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 1009 (4th Cir.1986), *cert. denied*, 479 U.S. 876, 107 S.Ct. 251, 93 L.Ed.2d 177 (1986) ("*A.H. Robins Co. I*"); *In re Salem Mortgage Co.*, 783 F.2d 626, 629 n. 15 (6th Cir.1986) (stating that

Congress apparently assumed Section 1291 would be available for bankruptcy appeals because that provision was at one time proposed to be the exclusive source of such jurisdiction). Title 28 U.S.C. § 1291 permits appeals only from "final decisions of the district courts." This finality requirement is considered "in a more pragmatic and less technical way in bankruptcy cases than in other situations." *In re Cottrell*, 876 F.2d 540, 541-42 (6th Cir.1989)(citing *In re Amatex Corp.*, 755 F.2d 1034, 1039 (3d Cir.1985)). In bankruptcy cases, "a 'functional' and 'practical' application [of Section 1291] is to be the rule." *A.H. Robins Co. I*, 788 F.2d at 1009. The reason for a more relaxed rule of appealability in bankruptcy cases is that:

> Bankruptcy cases frequently involve protracted proceedings with many parties participating. To avoid the waste of time and resources that might result from reviewing discrete portions of the action only after a plan of reorganization is approved, courts have permitted appellate review of orders that in other contexts might be considered interlocutory.

Id. at 1009 (citations omitted). Therefore, where an order in a bankruptcy case "finally dispose[s] of discrete disputes within the larger case," it may be appealed immediately. *In re Saco Local Dev. Corp.*, 711 F.2d 441, 444 (1st Cir.1983). We find that the district court's order entered in bankruptcy satisfies the finality requirement of Section 1291 for purposes of appealability.

We also believe appealability of the district court's order is sustainable under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *Cohen* holds that it is not always necessary that a judgment terminate an action before an appeal may be brought, and permits appellate review of decisions which "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546, 69 S.Ct. at 1225-26.

A collateral order is reviewable under *Cohen* when it: (1) conclusively determines the disputed question; (2) resolves an important question completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from final judgment. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 988 (3d Cir.1984) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S.Ct. 2454, 2457-58, 57 L.Ed.2d 351 (1978)). These three factors are equally fluid and are applied flexibly in determining whether an order involving a bankruptcy proceeding is reviewable. *In re Pan Am Corp.*, 16 F.3d 513, 515 (2d Cir.1994) ("*In re Pan Am Corp. I*"). Here we believe these conditions have been satisfied on all grounds. The district court's order conclusively determines that claims pending against the nondebtor defendants are not "related to" Dow Corning's bankruptcy proceeding for purposes of Section 1334(b). In addition, resolution of the "related to" jurisdictional question does not involve consideration of the merits of the pending tort claims. Finally, due to the unique circumstances of this case and the hardship that would inevitably result if we were to refrain from addressing the issues presented by this appeal at this time, the issues presented will be effectively unreviewable after a final judgment is rendered.

Because appellate jurisdiction exists, we turn to the questions on appeal.

III.

The first issue to be resolved is whether the district court has subject matter jurisdiction over breast implant claims pending not only against the debtor, Dow Corning, but also over certain claims pending against the nondebtor defendants. The nondebtor defendants argue that such jurisdiction exists pursuant to 28 U.S.C. § 1334(b) or, alternatively, 28 U.S.C. § 1367(a). We review the district court's jurisdictional ruling *de novo*. *In re Wolverine Radio Co.*, 930 F.2d 1132, 1138 (6th Cir.1991) (citation omitted).

Section 1334 grants jurisdiction to district courts in bankruptcy cases and proceedings as follows:

> (a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or *related to cases under title 11*.

28 U.S.C. § 1334 (emphasis added).

In addressing the extent of a district court's bankruptcy jurisdiction under Section 1334(b) over civil proceedings "related to" cases under title 11, we start with the premise that the "emphatic terms in which the jurisdictional grant is described in the legislative history, and the extraordinarily broad wording of the grant itself, leave us with no doubt that Congress intended to grant to the district courts broad jurisdiction in bankruptcy cases." *In re Salem*, 783 F.2d at 634. Although "situations may arise where an extremely tenuous connection to the estate would not satisfy the jurisdictional requirement" of Section 1334(b), *Robinson v. Mich. Consol. Gas Co., Inc.*, 918 F.2d 579, 584 (6th Cir.1990), Congressional intent was "to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate." *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1499 (1995) (citations omitted).

The definition of a "related" proceeding under Section 1334(b) was first articulated by the Third Circuit in *Pacor*. As stated in that case, the "usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy." *Pacor*, 743 F.2d at 994. An action is "related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling

and administration of the bankrupt estate." *Id.* A proceeding "need not necessarily be against the debtor or against the debtor's property" to satisfy the requirements for "related to" jurisdiction. *Id.* However, "the mere fact that there may be common issues of fact between a civil proceeding and a controversy involving the bankruptcy estate does not bring the matter within the scope of section [1334(b)]." *Id.* (stating also that "[j]udicial economy itself does not justify federal jurisdiction"). Instead, "there must be some nexus between the 'related' civil proceeding and the title 11 case." *Id.*

Our Circuit adopted the *Pacor* test for determining whether a civil proceeding is "related to" a bankruptcy proceeding under Section 1334(b) in *Robinson*, 918 F.2d at 583 (noting in doing so that circuit courts have "uniformly adopted an expansive definition of a related proceeding under section 1334(b)"). The majority of our sister circuits have likewise adopted the *Pacor* test for "related to" jurisdiction. *See In re G.S.F. Corp.*, 938 F.2d 1467, 1475 (1st Cir.1991); *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir.1990); *In re Lemco Gypsum, Inc.*, 910 F.2d 784, 788 and n.19 (11th Cir.1990); *In re Fietz*, 852 F.2d 455, 457 (9th Cir.1988); *In re Wood*, 825 F.2d 90, 93 (5th Cir.1987); *In re Dogpatch, U.S.A., Inc.*, 810 F.2d 782, 786 (8th Cir.1987); *A.H. Robins Co. I*, 788 F.2d at 1002 n. 11. According to the Supreme Court, the Second and Seventh Circuits have adopted slightly different tests for determining whether Section 1334(b) jurisdiction exists. *Celotex*, 115 S.Ct. at 1499 n. 6 (citing *UNR Indus., Inc. v. Continental Casualty Co.*, 942 F.2d 1101, 1103 (7th Cir.1991), *cert. denied* 503 U.S. 971 (1992) and *In re Turner*, 724 F.2d 338, 341 (2d Cir.1983)).

In addition, the Supreme Court recently cited *Pacor* with approval in addressing the broad scope of the jurisdictional grant in Section 1334(b). The Court stated:

> Congress did not delineate the scope of "related to" jurisdiction, but its choice of words suggests a grant of some breadth. The jurisdictional grant in [Section] 1334(b) was a distinct departure from the jurisdiction conferred under previous acts, which had been limited to

> either possession of property by the debtor or consent as a basis for jurisdiction. We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor* that "Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate," and that the "related to" language of [Section] 1334(b) must be read to give district courts (and bankruptcy courts under [Section] 157(a)) jurisdiction over more than simple proceedings involving the property of the debtor or the estate.

Celotex, 115 S.Ct. at 1498-99 (citations omitted) (recognizing at the same time that a bankruptcy court's jurisdiction cannot be limitless). The Court also stated that proceedings "related to" a bankruptcy proceeding include "suits between third parties which have an effect on the bankruptcy estate." *Id.* at 1499 n. 5 (citing 1 Collier on Bankruptcy § 3.01[1][c][iv], pp. 3-28 (15th ed.1994)). With these standards in mind, we turn to an examination of whether subject matter jurisdiction exists pursuant to Section 1334(b) over joint claims pending against Dow Corning and the various nondebtor defendants.

In their briefs and at oral argument, Dow Corning, Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter and Bristol-Myers Squibb proposed several theories for the existence of Section 1334(b) subject matter jurisdiction over certain breast implant claims pending against the nondebtor defendants, no one of which has been clearly determined to definitively confer "related to" jurisdiction under Section 1334(b). Specifically, the defendants argued that contingent claims for contribution and indemnification, jointly-held insurance policies,[8] the possibility of collateral estoppel with a corresponding increased exposure to liability, and the burden of defending against the overwhelming number of breast implant claims all give rise to the possibility that the Dow Corning estate will be seriously impacted if the claims at

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[8] Dow Chemical and Corning Incorporated are co-insured with Dow Corning under various liability policies.

issue, all of which to some degree affect the reorganization of Dow Corning under Chapter 11, are permitted to proceed in separate forums nationwide. We believe two of these theories support a finding that the district court has "related to" jurisdiction over claims at issue, and address them in turn.[9]

1. Claims for Contribution and Indemnification

Dow Corning, Dow Chemical and Corning Incorporated argue that the district court erred in its determination that "related to" jurisdiction does not exist over certain breast implant claims asserted against Dow Chemical and Corning Incorporated because, in addition to the claims asserted by the personal injury claimants, Dow Chemical and Corning Incorporated have asserted cross-claims against each other and Dow Corning in the underlying litigation, which will have an effect on the bankruptcy estate.[10] Minnesota Mining, Baxter, and Bristol-Myers Squibb argue that, despite the fact that they have not yet filed contribution and indemnification claims or proofs of claim relating to implant litigation in Dow Corning's bankruptcy case, they have contingent claims for contribution and indemnification that will have a conceivable effect on the bankruptcy proceedings. Minnesota Mining, Baxter, and Bristol-Myers Squibb therefore argue that the breast implant claims covered by their Section 157(b)(5) motions will give rise to thousands of claims against Dow Corning for indemnification and contribution. In addition, the nondebtor defendants claim that Dow Corning may itself have claims against them for contribution and indemnification

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[9] In our original opinion, we addressed the two additional arguments proffered by the movants in support of their assertion that "related to" jurisdiction exists over claims pending against Dow Corning and the nondebtor defendants. Upon reconsideration, we believe our finding that "related to" jurisdiction exists is best supported by the contribution and indemnification and joint insurance theories.

[10] According to Dow Corning, Dow Chemical, and Corning Incorporated, the shareholders have asserted "thousands of cross-claims for indemnity and contribution against Dow Corning in breast implant suits." (Brief for Dow Corning Corporation, The Dow Chemical Company, and Corning Incorporated at 21).

under theories of joint and several liability. The companies argue that these claims need to be resolved as part of Dow Corning's bankruptcy proceedings and reorganization plan, and certainly will affect the debtor's rights, liabilities, options, and freedom of action in the administration of its estate.

Relying on *Pacor*, the district court rejected this basis for "related to" jurisdiction and held that the possibility of contribution or indemnification should only be regarded as relevant if and when judgments are actually entered against the nondebtors. The district court stated:

> In the instant case, as in *Pacor*, there will be no contingent claim by the Shareholders against the debtor for indemnification until such time as a judgment is rendered and, then, the non-debtors would still have to proceed with an entirely separate proceeding in order to obtain indemnification from the Debtor under 11 U.S.C. § 502.

Pacor involved John and Louise Higgins' claim against the Philadelphia Asbestos Co. (Pacor) in state court seeking damages allegedly caused by Mr. Higgins' work-related exposure to asbestos supplied by the company. In response, Pacor filed a third-party complaint impleading the Johns-Manville Corporation, which Pacor claimed was the original manufacturer of the asbestos. After Johns-Manville filed for Chapter 11, a dispute ensued as to whether the Higgins-Pacor action was "related to" the Manville bankruptcy so that the entire controversy could be removed to bankruptcy court. The Third Circuit held that the primary Higgins-Pacor action would not affect the Manville bankruptcy estate, and therefore was not "related to" the bankruptcy proceedings. The court stated that the Higgins-Pacor action was, "[a]t best, a mere precursor to the potential third party claim for indemnification by Pacor against Manville," and held that, because all issues with regard to Manville's possible liability would be resolved in a subsequent third party impleader action, "there would be no automatic creation of liability against Manville on account of

a judgment against Pacor." *Pacor*, 743 F.2d at 995 (stating also that "[t]here would therefore be no effect on administration of the estate, until such time as Pacor may choose to pursue its third party claim"). Thus, the court in *Pacor* viewed the absence of "automatic" liability on the part of the debtor as dispositive in determining that Section 1334(b) "related to" jurisdiction did not exist.

It has become clear following *Pacor* that "automatic" liability is not necessarily a prerequisite for a finding of "related to" jurisdiction. The Third Circuit itself has emphasized that:

> A key word in [the] test is "conceivable." Certainty, or even likelihood, is not a requirement. Bankruptcy jurisdiction will exist so long as it is possible that a proceeding may impact on "the debtor's rights, liabilities, options, or freedom of action" or the "handling and administration of the bankrupt estate."

In re Marcus Hook Dev. Park Inc., 943 F.2d 261, 264 (3d Cir.1991) (citation omitted).

Our Circuit has held that Section 1334(b) "does not require a finding of definite liability of [an] estate as a condition precedent to holding an action related to a bankruptcy proceeding." *In re Salem*, 783 F.2d at 635. In *In re Salem*, our Court reversed a district court's determination that it lacked Section 1334(b) subject matter jurisdiction over a proposed settlement order entered by the bankruptcy court. Prior to bankruptcy, Salem Mortgage Company and related debtor and nondebtor corporations acted as mortgage brokers. Salem and three related corporations filed voluntary petitions under Chapter 11 and the bankruptcy court ordered the petitions of the four debtors consolidated for administration. The Michigan Attorney General subsequently filed an adversary proceeding against the debtors and eight other defendants. The major parties in interest negotiated a stipulation for temporary class certification and a proposed final consent judgment, which was conditionally approved by the bankruptcy court. The bankruptcy court eventually entered a Proposed Order Approving Class Certification, Settlement of Class Action

Litigation, and Entry of Consent Judgment. While reviewing the proposed order, the district court raised the question of whether it possessed "related to" subject matter jurisdiction over the adversary proceeding, and concluded it did not. Our Court reversed that determination stating:

> The proposed order in this case provided that the plaintiff classes would release all claims against the debtors arising from the mortgage transactions except for claims concerning the alleged misappropriation of escrow funds. The order also provided that the debtors pay civil penalties under the Michigan Consumer Protection Act. The corporations' penalties are to be subordinated to the claims of the general creditors. Resolution of the dispute, moreover, will affect the liability of the debtors to the investors. For example, to the extent the value of the mortgages is reduced by their reformation, the investors may have an action against the debtors such as breach of the assignment agreement. Because of the nature of these mortgage transactions, we hold that this dispute is sufficiently related to the estate of the bankrupt such that the district court had jurisdiction over the subject matter.

Id. at 634. The Court stated that the case was distinguishable from *Pacor* on the ground that a finding of definite liability of an estate is not a prerequisite to holding an action "related to" a bankruptcy proceeding, and because the parties in the mortgage transactions in the proceeding at issue were "more intertwined" than the parties in *Pacor*. *Id.* at 635.

This Court's decision in *In re Salem* has been cited for the proposition that "when [a] plaintiff alleges liability resulting from the joint conduct of the debtor and non-debtor defendants, bankruptcy jurisdiction exists over all claims under section 1334." *In re Wood*, 825 F.2d at 94 (citing *In re Salem*, 783 F.2d at 634). *In re Wood* involved a dispute among the directors/stockholders of a medical clinic. Dr. Arthur Wood, III sued Dr. and Mrs. James Wood and Woodrow Barham for the wrongful appropriation of corporate assets. Before the filing of Dr. Arthur Wood's single complaint

against all three defendants, Dr. and Mrs. James Wood had filed a Chapter 11 petition. A dispute subsequently ensued as to whether the entire matter fell within bankruptcy jurisdiction. The Fifth Circuit held that the "complaint [was] sufficiently related to the pending bankruptcy to allow the district court to exercise jurisdiction under section 1334." *In re Wood*, 825 F.2d at 93. The Court further stated:

> The complaint against the bankruptcy debtors could have a conceivable effect on their bankruptcy. The plaintiff seeks to recover stock and monies that the debtors allegedly appropriated from the clinic. They seek to resolve the disputed allocation of interest in the clinic. To the extent that the debtors' interest in the clinic, their stock holdings, or their withdrawals are now property of the estate, the complaint against them has a potential effect on their estate.

Id. at 93-94. The Court acknowledged the possibility that the complaint, which raised a post-petition claim, could ultimately have no effect on the bankruptcy proceeding. Unable, however, to conclude that the suit would have *no* conceivable effect on that proceeding, the court found "related to" jurisdiction as to both the debtor and nondebtor defendants, stating:

> The plaintiff has filed one complaint against the defendants seeking liability for their joint conduct. Success against any of the defendants will have a potential effect on the estate. For example, if Dr. Wood and his wife are held liable but Barham is not, the bankrupt estate may bear the entire burden of the judgment. If, on the other hand, Barham is found jointly liable, the estate may bear only a portion of the judgment. Moreover, in filing the complaint, the plaintiff challenged the combined actions of both the debtors and Barham, a non-debtor. Resolution of the dispute will necessarily involve, therefore, consideration of Barham's involvement in those actions. We find support in the Court of Appeals for the Sixth Circuit and lower courts, which have held that

> when the plaintiff alleges liability resulting from the joint conduct of the debtor and non-debtor defendants, bankruptcy jurisdiction exists over all claims under section 1334.

Id. at 94.

The degree of identity between a debtor and nondebtor codefendants was an important factor in *A.H. Robins Co. I*, a mass tort case involving the Dalkon Shield, an intrauterine contraceptive device. In that case, A.H. Robins was faced with an overwhelming number of federal and state actions seeking damages for injuries allegedly sustained by the use of the Dalkon Shield. The pending litigation caused A.H. Robins, the manufacturer of the device, to file a petition under Chapter 11 of the Bankruptcy Code. By the time A.H. Robins filed its petition, over 5,000 suits had been filed. More than half named A.H. Robins as the sole defendant, while a codefendant or codefendants were named in the others. When the filing of the petition automatically stayed all suits against A.H. Robins under Section 362(a), a number of plaintiffs in suits in which A.H. Robins was named along with at least one codefendant sought to sever their actions against A.H. Robins and proceed against the codefendant or codefendants. A.H. Robins then sought injunctive relief restraining the prosecution of the actions against its codefendants. The district court granted a preliminary injunction, holding that all actions that might be satisfied from proceeds of the debtor's products liability policy with Aetna Casualty and Insurance Company were stayed, and enjoined further litigation in eight civil actions.

Shortly after entry of the preliminary injunction, A.H. Robins moved for: a determination of trial venue of all Dalkon Shield suits; identification of such cases as were "related to" the Chapter 11 case; and transfer of such cases to the Eastern District of Virginia for trial. The district court held that: (1) pursuant to Section 1334(b), all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield were proceedings related to the Chapter 11 case; (2) pursuant to Sections 157(b)(5) and

1334(b), all such actions, wherever pending, were to be tried in the Eastern District of Virginia; (3) all actions related to the Chapter 11 case then pending in or subsequently removed to any federal district court during the pendency of the Chapter 11 case were to be transferred to the Eastern District of Virginia; and (4) the court was not prevented from later abstaining under Section 1334(c)(1) or remanding under Section 1452(b). This order and the preliminary injunction were both appealed to the Fourth Circuit.

In discussing the propriety of the stay issued against A.H. Robins' nondebtor codefendants, the Fourth Circuit stated that, although Section 362(a)(1) is generally available only to a debtor, proceedings against nonbankrupt codefendants may be stayed by a bankruptcy court where there are "unusual circumstances." *A.H. Robins Co. I*, 788 F.2d at 999. Such a situation arises when "there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." *Id.* The court stated that "an illustration of such a situation would be a suit against a third-party who is entitled to absolute indemnity by the debtor on account of any judgment that might result against them in the case." *Id.* In addition, such a relationship may exist where codefendant liability is "directly attributable to the debtor." *Id.* at 1004.

Based on the principles outlined above, we believe the district court has "related to" subject matter jurisdiction over the breast implant claims pending against the nondebtor defendants in this case. Thousands of suits asserted against Dow Corning include claims against the nondebtors, and the nature of the claims asserted establishes that Dow Corning and the various nondebtor defendants are closely related with regard to the pending breast implant litigation.[11] Dow Chemical and

[11] The opt-out claims asserted against Dow Corning and the various nondebtor defendants generally can be divided into four categories: (i) "Multiple Implant Actions," which are actions where plaintiffs received implants manufactured by both Dow Corning and one or more of the nondebtors; (ii) "Supplier Actions," which involve

Corning Incorporated have already asserted cross-claims against each other and Dow Corning in the underlying litigation, and the other nondebtor defendants have asserted repeatedly throughout their briefs, motions, and oral arguments that they intend to file claims for contribution and indemnification against Dow Corning, and we have no reason to doubt the veracity of those assertions at this time.

We find that it is not necessary for the appellees first to prevail on their claims against the nondebtor defendants, and for those companies to establish joint and several liability on Dow Corning's part, before the civil actions pending against the nondebtors may be viewed as conceivably impacting Dow Corning's bankruptcy proceedings. The claims currently pending against the nondebtors give rise to contingent claims against Dow Corning ~~which~~ unquestionably could ripen into fixed claims. The potential for Dow Corning's being held liable to the nondebtors in claims for contribution and indemnification, or vice versa, suffices to establish a conceivable impact on the estate in bankruptcy. Claims for indemnification and contribution, whether asserted against or by Dow Corning, obviously would affect the size of the estate and the length of time the bankruptcy proceedings will be pending, as well as Dow Corning's ability to resolve its liabilities and proceed with reorganization. In addition, we believe there is a qualitative difference between the single suit involved in *Pacor* and the overwhelming number of cases asserted against Dow Corning and the nondebtor defendants in this case. A single possible claim for indemnification or contribution simply does not represent the same kind of threat to a debtor's

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claims against the nondebtors as manufacturers and claims against Dow Corning as the supplier of silicone materials to the nondebtors; (iii) "Conspiracy Actions," which allege that Dow Corning and the nondebtors conspired to defraud the plaintiffs by fraudulently withholding material information regarding the hazards of breast implants: and (iv) "Form Complaint Actions," which simply name Dow Corning and the nondebtors as defendants without making any specific allegations of individual wrongdoing. (See Motion of Minnesota Mining and Manufacturing Company for an Order Pursuant to 28 U.S.C. § 157(b)(5) at 7).

reorganization plan as that posed by the thousands of potential indemnification claims at issue here.

Cognizant of the fact that "related to" jurisdiction cannot be limitless and concerned about granting benefits of the automatic stay in bankruptcy to solvent codefendants, we nevertheless believe the possibility of contribution or indemnification liability in this case is far from attenuated. We conclude that Section 1334(b) jurisdiction exists over the actions pending against Dow Chemical, Corning Incorporated, Minnesota Mining, Baxter, and Bristol-Myers Squibb that are the subject of the companies' Section 157(b)(5) motions.

2. Joint Insurance

Dow Corning, Dow Chemical and Corning Incorporated also argue that "related to" jurisdiction exists as to claims pending against the shareholders because the three companies share joint insurance. We believe this argument provides additional support for the existence of "related to" jurisdiction under the unique facts of this case, but address it only briefly because we have already concluded that Section 1334(b) jurisdiction exists over breast implant claims pending against Dow Corning and one or both of its parents.

Dow Corning, Dow Chemical and Corning Incorporated are co-insured under various insurance policies, which together provide over $1 billion in coverage. Dow Corning's interest in the policies is one of the largest assets of its bankruptcy estate. In addition, Dow Corning recently entered into ten new insurance settlements under which the estate will receive, if approved by the bankruptcy court, approximately $350 to $450 million in cash. Most of these settlements involve policies under which Dow Chemical or Corning Incorporated is a co-insured.

Dow Corning, Dow Chemical, and Corning Incorporated claim that the district court's order, by allowing thousands of claims to proceed separately against Dow Chemical and Corning Incorporated, will diminish the value of this major bankruptcy asset to the extent that settlements, judgments and defense costs incurred by the shareholders will exhaust pol-

icy limits otherwise available to Dow Corning, its creditors, and individuals asserting claims in the bankruptcy proceedings. In addition, all three co-insureds argue that the policies will be further diminished if and when payments must be made to Minnesota Mining, Baxter, or Bristol-Myers Squibb. Dow Chemical has already notified insurers that it is asserting claims against the jointly-held policies on the ground that, as a co-insured, it is entitled to recover from the insurers all of its defense costs, as well as any settlements or judgments paid by it in litigating breast implant claims. The concern, then, is that permitting scores of trials against the shareholders to go forward while litigation against the debtor is stayed may result in the shareholders making claims for insurance and seeking and obtaining payment from the insurers before Dow Corning is able to make any claims of its own.

The district court rejected this argument for the existence of "related to" jurisdiction, holding that, while a bankruptcy court has broad discretion over a debtor's interest in a liability insurance policy shared with a nondebtor, no judgment has been entered yet against Dow Chemical or Corning Incorporated and neither company has a claim pending against the insurance policies at this time. We believe the district court is in error because, as we stated earlier, an immediate impact on a debtor's estate is not a prerequisite for Section 1334(b) jurisdiction. Under the facts of this case, we believe the possible depletion of insurance policies depends on contingencies sufficiently immediate to support a finding of "related to" jurisdiction. *See, e.g., A.H. Robins Co. I*, 788 F.2d at 1008 (stating that "irreparable harm would be suffered by the debtor and by the defendants since any of [the] suits against [the] co-defendants, if successful, would reduce and diminish the [debtor's] insurance fund"); *In re Zale Corp.*, 62 F.3d 746, 758-59 (5th Cir.1995) (concluding that, where disputes regarding an insurance policy can have an effect on a debtor's estate, the bankruptcy court has "related to" jurisdiction over nondebtors' claims against the insurer); *Coar v. National Union Fire Ins. Co.*, 19 F.3d 247, 249 (5th Cir.1994) (stating that, where there is a "cognizable threat" that insurance policy proceeds would not cover plaintiffs' claims and could

expose the debtor's estate to liability, a suit against a debtor's insurer is "related to" the debtor's bankruptcy case); *In re Titan Energy, Inc.*, 837 F.2d 325, 329 (8th Cir.1988) (noting that the scope of a products liability insurance policy affects the size of a debtor's estate for distribution).

Dow Corning's interest in the insurance policies at issue is property of its estate under the expansive definition set forth in 11 U.S.C. § 541(a)(1). The threat posed to those insurance policies if claims pending against Dow Chemical and Corning Incorporated are permitted to go forward in a separate manner supports a finding of "related to" jurisdiction under Section 1334(b). The prospect of Dow Chemical and Corning Incorporated being able to assert mature, liquidated claims against the insurance proceeds if litigation pending against them is permitted to go forward demonstrates a conceivable impact on the bankruptcy proceedings. If it is determined that Dow Chemical or Corning Incorporated has a priority to the insurance proceeds, even if the bankruptcy court has the power to prevent payments of the proceeds while Dow Corning is in bankruptcy, the risk remains that the insurance coverage may be eviscerated when the proceeds are eventually distributed. In addition, certain of the policies cover defense expenses, and those costs alone may significantly reduce the pool of coverage available to Dow Corning if the claims pending against Dow Chemical and Corning Incorporated are allowed to proceed separately. In addition, the bankruptcy court has yet to determine whether it has the power to prevent Dow Corning's co-insureds from receiving proceeds of the jointly-held policies while Dow Corning is in bankruptcy. Resolution of the dispute over the right to proceeds alone will have a conceivable effect on Dow Corning's bankruptcy proceedings.

IV.

We next address the power of the district court, sitting in bankruptcy, to fix the venue for the trial of personal injury tort and wrongful death claims asserted in non-bankruptcy

forums pursuant to 28 U.S.C. § 157(b)(5). Section 157(b)(5) provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

The purpose of Section 157(b)(5) is "to centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case.' " *A.H. Robins Co. I*, 788 F.2d at 1011 (citation omitted). Centralization of claims increases the debtor's odds of developing a reasonable plan of reorganization which will "work a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the . . . claims." *Id.*

It has been established that a "bankrupt debtor who is a defendant in a personal injury action may move under section 157(b)(5) to transfer the case to one of two venues: (1) the district where the bankruptcy is proceeding; or (2) the district where the claim arose." *In re Pan Am Corp. I*, 16 F.3d at 516. The question for our consideration is whether Section 157(b)(5) allows for the transfer of personal injury and wrongful death claims pending against nondebtor defendants who have been sued with a debtor under claims of joint and several liability.

The Fourth Circuit has construed Section 157(b)(5) as permitting the transfer of such cases, and we follow that Circuit's approach. In *A.H. Robins Co. I*, by the time A.H. Robins filed its Chapter 11 petition, 5,000 suits were pending against the company. More than half of those cases named A.H. Robins as the sole defendant, while a codefendant or codefendants were named in the others. After the district court issued a preliminary injunction against suits by A.H. Robins' codefendants, A.H. Robins moved for a determination of trial venue of all Dalkon Shield suits, an identification of cases "related to" the bankruptcy case, and the transfer of those cases to the

district court where the bankruptcy proceedings were being held for trial. The district judge held that, pursuant to Section 1334(b), all actions based upon personal injury tort or wrongful death claims arising from the use of the Dalkon Shield were proceedings "related to" A.H. Robins' Chapter 11 case and that, pursuant to Sections 1334(b) and 157(b)(5), all such actions, wherever pending, were to be tried in the Eastern District of Virginia. In addition, the district court held that all actions "related to" the Chapter 11 case then pending in any federal district court or subsequently removed to any federal district court during the pendency of A.H. Robins' bankruptcy case were to be transferred to the Eastern District of Virginia.

In reviewing the validity of the district court's order fixing the venue for the trial of all Dalkon Shield cases and transferring such cases to the Eastern District of Virginia, the Fourth Circuit stated: "Unquestionably the district court in this case had the power under the statute to fix the trial venue in its district for all the Dalkon Shield cases." *Id.* at 1010 (stating also that the power of the district court to fix venue for all the pending Dalkon Shield tort cases is "stated in unmistakable terms in section 157(b)(5)"). The Fourth Circuit stated its intent in consolidating the Dalkon Shield litigation as follows:

> Since the Dalkon Shield litigation began, forty claims have actually been tried but over $517,000,000 have been expended in defending or settling Dalkon Shield suits or claims. It is impossible to anticipate the stupendous costs that would be involved if all the claims here had to be tried. If the claimants as a whole are to realize reasonable compensation for their claims, it is obviously in the interest of the class of claimants as a whole to obviate the tremendous expense of trying these cases separately. If the bankruptcy court could arrive at a fair estimation of the value of all the claims and submit a fair plan of reorganization based on such estimation, with some mechanism for dispute resolution and acceptable to all interested parties, great benefit to all the

> claimants could be achieved and the excessive expense of innumerable trials, stretching over an interminable time, could be avoided. In addition, the real purpose of the proceedings (i.e., a reorganization of the debtor and its continuance as a going business) could be attained.

Id. at 1013 (footnote omitted). The court stated that these objectives could not be achieved until "all Dalkon Shield claims and suits [were] centralized before a single forum where all interests [could] be heard and in which the interests of all claimants with one another [could] be harmonized." *Id.* at 1014. The court concluded by stating:

> That undoubtedly was the purpose of the motion to fix venue and to transfer the pending suits to the district court sitting in bankruptcy before which the proceedings were pending. This unquestionably was the idea which prompted the district court to opt tentatively in his order fixing venue in the district court sitting in bankruptcy for all these claims. We approve of the idea and find it conducive of the interests of all concerned.

Id. at 1014.

We agree with the Fourth Circuit that Section 157(b)(5) should be read to allow a district court to fix venue for cases pending against nondebtor defendants which are "related to" a debtor's bankruptcy proceedings pursuant to Section 1334(b).[12] This approach will further the prompt fair, and complete resolution of all claims "related to" bankruptcy proceedings, and harmonize Section 1334(b)'s broad jurisdictional grant with the oft-stated goal of centralizing the administration of a bankruptcy estate.

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[12] We note that our holding here is limited to the district court's ability to consider motions under 28 U.S.C. § 157(b)(5) with respect to the trial venue of the breast implant claims at issue.

V.

Finally, a Section 157(b)(5) motion "requires an abstention analysis." *In re Pan Am Corp.*, 950 F.2d 839, 844 (2d Cir.1991) ("*In re Pan Am Corp. II*"). The abstention provisions of 28 U.S.C. § 1334(c) qualify Section 1334(b)'s broad grant of jurisdiction. *In re Salem*, 783 F.2d at 635. It is for the district court to "determine in each individual case whether hearing it would promote or impair efficient and fair adjudication of bankruptcy cases." *Id.*

Section 1334 provides for two types of abstention: discretionary abstention under 28 U.S.C. § 1334(c)(1) and mandatory abstention under 28 U.S.C. § 1334(c)(2). Section 1334(c)(1) provides:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

Section 1334(c)(2) states in relevant part:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

For mandatory abstention to apply, a proceeding must: (1) be based on a state law claim or cause of action; (2) lack a federal jurisdictional basis absent the bankruptcy; (3) be commenced in a state forum of appropriate jurisdiction; (4) be capable of timely adjudication; and (5) be a non-core proceeding. Non-core proceedings under Section 157(b)(2)(B) (i.e. liquidation of personal injury tort or wrongful death case)

are not subject to Section 1334(c)(2)'s mandatory abstention provisions pursuant to 28 U.S.C. § 157(b)(4).[13]

The district court in this case determined that Section 157(b)(4) rendered exempt from the mandatory abstention requirement all personal injury tort claims pending solely against Dow Corning, and decided not to abstain discretionarily with regard to those claims at this time. Because the district court found that it did not have subject matter jurisdiction over the claims pending against the nondebtor defendants, it did not address the abstention issue in detail and merely incorporated by reference its analysis of the abstention issue pertaining to claims pending solely against Dow Corning. It also remains to be fully determined whether the abstention exception in Section 157(b)(4) applies to claims pending against nondebtor defendants and, if not, whether the factors calling for mandatory exemption under Section 1334(c)(2) have been met. The district court did not directly address these matters, and we refrain from addressing them in the first instance. Because we believe the district court is in a better position to make the necessary abstention determinations, as to both mandatory and discretionary abstention, we remand the case to the district court for further proceedings on this issue.

VI.

We REVERSE the district court's determination that it lacked subject matter jurisdiction over the tort claims pending against the nondebtor defendants and that it did not have the power to transfer those claims pursuant to Section 157(b)(5). In addition, we REMAND this case to the district court for further proceedings on the issue of Section 1334(c) abstention.

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[13] Section 157(b)(4) provides that "[n]on-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2)."

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 95-CV-72397-DT

Dated: Sept. 12, 1995.

In Re: DOW CORNING CORPORATION,

Debtor.

MEMORANDUM OPINION AND ORDER
ON THE DEBTOR DOW CORNING'S
MOTION TO TRANSFER

HON. DENISE PAGE HOOD

I. *INTRODUCTION/FACTS:*

This matter is before the court on the Debtor Dow Corning Corporation's motion to transfer certain breast implant cases to the United States District Court, Eastern District of Michigan pursuant to 28 U.S.C. § 157(b)(5). Responses were filed and a hearing was held on the matter.

At the onset, the Court is very cognizant of the rights of the claimants involved in this matter under our judicial system as well as the protections afforded to the Debtor Dow Corning under our bankruptcy laws. With these sometime competing interests in mind, the Court has attempted to balance the rights of both the Debtor and the claimants in its decision.

On May 15, 1995, the Debtor, Dow Corning Corporation, sought a voluntary petition for reorganization under Chapter

11 of the Bankruptcy Code with the Bankruptcy Court of the United States District Court, Eastern District of Michigan, Northern Division in Bay City, before the Honorable Arthur J. Spector. On June 12, 1995, the Debtor filed a motion to transfer certain breast implant cases before the Bankruptcy Court. Judge Spector entered a Determination and Report and Recommendation Regarding the Debtor's Motion to Transfer on June 13, 1995 indicating that the District Court had jurisdiction over this motion. On July 5, 1995, this Court entered an order provisionally transferring the opt-out breast implant cases involving the Debtor only to the Eastern District of Michigan pending a hearing scheduled for the motion on July 31, 1995.

Debtor is a leading producer of silicone products. Dow Corning was formed in 1943 as a corporation owned by Corning Incorporated and Dow Chemical Company (each has a 50% ownership interest) to develop and produce silicones and silicone products during World War II. In 1994, the Debtor Dow Corning's total sales were nearly $2 billion. The Debtor manufactured breast implants for commercial use from approximately 1964 until 1992. During a part of this time, the Debtor also supplied certain raw materials to other breast implant manufacturers. According to the Debtor, in the year of its highest sales in 1991, breast implants only accounted for less than 1% of the Debtor's sales.

Silicone gel breast implants consist of a silicone elastomer "envelope" filled with silicone gel. The implants are surgically implanted for purposes of breast reconstruction in breast cancer patients and for cosmetic reasons. These implants have the same chemical make up as silicone materials used to make catheters, shunts, pacemaker leads and other medical devices.

In the early 1980s, silicone breast implants were subject to occasional product liability lawsuits. By 1987, 50 such lawsuits had been filed. In 1990 and 1992, over 100 lawsuits were filed against the Debtor. However, beginning in 1992, the implant litigation drastically increased. Over 3,000 suits were filed against the Debtor in 1992, over 8,000 in 1993 and

over 7,000 in 1994. The litigation included both individual claims and actions on behalf of putative classes. By early 1995, the Debtor was a Defendant in 45 putative class action lawsuits (31 in various federal district courts, 12 in state courts and 2 in Canada) and over 19,000 individual lawsuits. All the suits combined involved more than 36,000 claimants. The Debtor was sued both as the manufacturer of breast implants and supplier of silicone raw materials to other breast implant manufacturers.

According to the Debtor, these claims uniformally allege that breast implants cause diseases, including autoimmune disease, scleroderma, systemic disorders, joint swelling and chronic fatigue. The damages sought in these cases are substantial, ranging from hundreds of thousands to tens of millions of dollars in compensatory and punitive damages. Claims involving mechanical defects, including rupture of the implants, are also alleged by the claimants.

In June 1992, pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multi District Litigation ("MDL") ordered that federal actions involving breast implants be transferred to the Honorable Sam C. Pointer in the Northern District of Alabama for coordinated or consolidated pretrial proceedings ("MDL No. 926"). *In re Silicone Gel Breast Implants Products Liability Litigation*, MDL No. 926, 793 F.Supp. 1098 (J.P.M.L. 1992).

The Debtor asserts that as that litigation progressed, so did efforts to achieve a global resolution of this controversy. Although the Debtor contends that its products were safe and did not cause the diseases being claimed, it was compelled to recognize that its resources were not unlimited and that the litigation was diverting management's attention from the company's core businesses and that the costs of continued litigation would be substantial. According to the Debtor, in 1994, its litigation costs exceeded $200 million.

After months of negotiations with codefendants and claimants, a court-approved "Steering Committee" representing breast implant claimants, the Debtor and other

implant manufacturers entered into a "global settlement" of breast implant claims on March 23, 1994. The Debtor agreed to contribute up to $2.02 billion (out of a total settlement of $4.25 billion) of the funding required by the settlement. Judge Pointer approved the settlement as fair and reasonable in a September 9, 1994 Order after certifying one of the consolidated federal actions as a class action for purposes of settlement under Fed.R.Civ.P. 23(b)(3).

It appears that the global settlement did not resolve the controversy and the future of that agreement, at this time, is in question. First, the Agreement is oversubscribed in that the claims being made against the established funds exceed the Defendants' funding commitments. Second, numerous claimants have opted not to participate in the settlement, electing instead to pursue individual suits. As of May 1995, over 6,000 claimants had opted out of the global settlement and are pursuing individual actions ("opt-out" claimants). The Debtor asserts that it cannot both fund the settlement and continue to incur substantial litigation costs in connection with the opt-out claimants. These opt-out claims which led to costly proceedings in state courts, are a major reason for the Debtor's decision to seek bankruptcy protection, according to the Debtor.

In early 1992, the Food and Drug Administration ("FDA"), asked for a voluntary moratorium on the production of breast implants. Since that time, the Debtor has tried to verdict six breast implant cases involving nine claimants. The jury returned a verdict in favor of the Debtor in three of the cases, in favor of the plaintiffs in two of the cases; and in the sixth case, involving two plaintiffs, the jury found in favor of one plaintiff and against the other. According to the Debtor, none of the juries have awarded punitive damages in the post-moratorium trials.

The Debtor asserts that breast implant trials are time-consuming. Complex scientific evidence is involved in various scientific fields. The above trials ranged in length from two to eleven weeks, excluding months of preparation that

preceded each trial. According to the Debtor, the central issue was the same: whether silicone gel breast implants cause disease. The Debtor asserts that the complexity of the cases placed at a substantial disadvantage its efforts to deal with the opt-out claims which were being pursued in state courts. The state proceedings were uncoordinated and trial dates were overlapping. When it filed for bankruptcy protection, the Debtor faced approximately ninety trials over the next six months, including seven trials with twenty-eight plaintiffs in Texas during the month of June 1995. From the Debtor's perspective, these conflicting trial settings created frantic conditions that made it impossible to fairly, rationally, and efficiently resolve the central scientific issue of whether implants cause the diseases that are alleged. The Debtor states that it could not succumb to exorbitant settlement demands nor could it go to trial knowing that it could not muster the resources necessary to mount an effective defense on so many fronts simultaneously. The Debtor claims it was forced to seek bankruptcy protection under Chapter 11 of the Bankruptcy Code. However, despite the Chapter 11 proceedings and the automatic stay provisions of 11 U.S.C. § 362, the breast implant litigations are still ongoing. Plaintiffs throughout the United States have filed notices of nonsuit against, dismissals of and motions to sever the Debtor in order to proceed to trial against Dow Chemical Co. and/or Corning, Inc. In June and July 1995, suits against Dow Chemical and/or Corning were set for trial in numerous counties throughout Texas.

The Debtor has envisioned essentially a four-step process in its reorganization proceedings. The Debtor's proposal claims to have taken into account the substantive and procedural rights of the opt-out claimants and also ensures the integrity of the bankruptcy proceeding. The first step is the removal to local federal district courts of state opt-out claims involving the Debtor's implants pursuant to 28 U.S.C. § 1452(a). The second step is the instant motion to transfer, which seeks to have all of the opt-out actions then transferred

to the Eastern District of Michigan. Should the second step be granted, the third step is a motion to consolidate the transferred claims and an early trial on the threshold issue of whether implants cause the diseases being claimed pursuant to Fed.R.Civ.P. 42. The Court would oversee a consolidated, adversary trial that would focus on the scientific evidence as it relates to the core issue of causation which would be binding on all opt-out claimants. The fourth step is for the bankruptcy court to conduct an estimation or other valuation proceeding, taking into account the results of the threshold trial on causation, and to approve a plan of reorganization that is consistent with that determination. Additional proceedings may be thereafter determined by the Court at the conclusion of the estimation or valuation proceedings, taking into account the bankruptcy court's plan of reorganization.

The Official Committee of Tort Claimants ("Tort Claimants" or the "Committee") asserts in its brief in opposition to the Debtor's Motion to Transfer that Dow Chemical and the Debtor knew of and concealed from the public substantial data suggesting that silicones were dangerous to the human body. Notwithstanding the Debtor's and its parents' repeated assurances to the public that its products were safe, jury awards, settlements and a very large proposed class settlement reflect that thousands of women have suffered injuries as a result of receiving the implants. The Committee asserts that apart from the issue of disease causation, many breast implant recipients have been injured and often horribly scarred by the rupturing or leaking of implants. Countless others fear that their implants may rupture or leak in the future. These women either have had or will need to have costly and painful "explanation" surgery to remove their implants and are entitled to substantial damages regardless of whether the leaking silicone also caused a "disease." The Committee further asserts that the incidence of various conditions varies with each woman depending on their particular medical history and biological characteristics.

According to the Committee, several juries of the United States have entered verdicts, ranging into the millions of dollars, holding the Debtor liable for injuries caused by its breast implants. The Committee asserts that the Debtor hopes to wipe out these judgments and this history should it prevail in one consolidated trial in this District and eliminate its liability to tens or hundreds of thousands of injured women.

The Committee states that while the global settlement approved by Judge Pointer of over $4 billion is sizable, it is insufficient to compensate the plaintiffs for the injuries they have suffered. In a report released on June 15, 1995 by the claims administrator appointed by Judge Pointer to implement the global settlement, Texas State Court Judge Ann Cochran, 440,000 women have registered under the settlement as potential claimants.

In its Motion to Transfer, the Committee asserts that the Debtor has wreaked procedural havoc by removing numerous pending state court cases to federal courts. Many of these cases have subsequently been transferred to Judge Pointer as "tag-along" cases by the MDL Panel. These cases join the more than 10,000 actions earlier transferred to Judge Pointer pursuant to the MDL Panel's determination that joint pretrial proceedings before a single court that could develop substantial expertise would conserve resources and best serve the interests of all parties. According to the Committee, the Debtor's attempt to transfer all opt-out actions to this Court would run roughshod over the considered judgments of the MDL Panel and unnecessarily place this Court on a collision course with Judge Pointer. The Committee asserts that Judge Pointer has acquired an intimate and unrivaled familiarity with the breast implant litigation since presiding over the consolidated pre-trial proceedings in the thousands of pending federal breast implant suits in June 1992. Judge Pointer has supervised discovery that has included approximately 225 depositions and production of some 10 million pages of documents and has presided over complex and lengthy proceed-

ings to approve and implement the global settlement since spring 1994.

The Committee further asserts that the Debtor's parent corporations, Dow Chemical and Corning, Inc. are merely trying to ride the coat tails of the Debtor's bankruptcy proceedings in order to benefit from the Debtor's protection under the bankruptcy laws.

The issues before the Court are: 1) whether it has jurisdiction to transfer the claims involving the Debtor; 2) if the Court does have jurisdiction to transfer the claims, whether the Court should abstain from exercising its authority; and 3) whether it has jurisdiction over the claims against the Shareholders.

II. *ANALYSIS*

A. *Whether this Court has the jurisdiction and authority to transfer the cases to the E.D. of Michigan pursuant to 28 U.S.C. § 157(b)(5).*

It is undisputed that the Debtor's bankruptcy case is pending before the Bankruptcy Court, of the United States District Court, Eastern District of Michigan. This Court has original and exclusive jurisdiction of the Debtor's title 11 action pursuant to 28 U.S.C. § 133(a). 28 U.S.C. § 157(b)(5) provides that this District Court has the authority to determine the trial venue of any personal injury tort claims involving the Debtor.

> (5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

Personal injury and wrongful death claimants are specifically subject to the overarching bankruptcy policy of centralizing mass tort litigation so that the claimants' jury trial rights are preserved. *Langenkamp v. Culp*, 498 U.S. 42 (1990). Section 157(b)(5) treats personal injury claims as a special class

within the realm of bankruptcy law. *Calumet Nat'l Bank V. Levine*, 179 B.R. 117, 120 (N.D. Ind. 1995). This section confers enlarged powers upon the district court where the bankruptcy actin was filed to fix venue of personal injury claims *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 832 (5th Cir. 1993), *cert. denied*, 113 S.Ct. 2963 (1993). The district court where the bankruptcy action was filed has the sole authority for ultimately fixing the trial venue for personal injury actions against the bankruptcy debtor. *Calumet*, 179 B.R. at 123.

B. *If this Court does have jurisdiction, whether this Court has the authority to transfer certain opt-out claims from the MDL panel, Case No. 926 and MDL Judge in the N.D. of Alabama to the E.D. of Michigan.*

The Tort Claimants argue that the MDL Panel's previous order preempts this Court's authority to transfer certain opt-out claims from the MDL Panel, Case No. 926 to this Court. Other responses and objections filed with this Court have also argued that this Court has no authority to transfer cases from other districts and that only those district courts have the authority to transfer cases. Generally, the district court where the suit is pending has the sole authority to transfer a suit. However, with regards to a bankruptcy action where personal injury tort claims are involved, the Fourth Circuit in *In re A.H. Robins Co., Inc.*, 788 F.2d 994 (4th Cir. 1986), *cert. denied*, 479 U.S. 876 (1986), stated:

> . . . As the appellants correctly construe [28 U.S.C.] section 1412, the authority to transfer a suit under that statute rests solely with the court in which the suit is pending and it provides no authority whatsoever to a district court sitting in bankruptcy in one district and having jurisdiction of the bankruptcy to transfer the venue of a case against the bankrupt to another district. Section 157(b)(5), however, expressly confers on the district

court sitting in bankruptcy and having jurisdiction of the bankruptcy proceedings the power to fix the venue of any tort case against the debtor pending in other districts. The purpose of this latter statute, was, as Congressman Kastenmeir declared, to centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case.' (cite omitted) That purpose would be thwarted and the plain language of section 157(b)(5) nullified if the power of the district court sitting in bankruptcy to fix the venue for tort claims against a debtor was to be preempted by the provisions of section 1412. We do not believe this to have been the intention of Congress in enacting the two statutes. Section 157(b)(5) was drafted to cover the procedure in connection with a special group of cases, to wit, *personal injury tort claims against a debtor in Chapter 11 proceedings whenever pending and in that connection the section is supreme*. In all other cases related to the bankruptcy proceedings, however, the general statute (i.e., section 1412) would govern. This, we think, is the proper construction to be given the two statutes. It is a construction which harmonizes the two sections. It conforms to that established canon of statutory construction that '[w]e must read the statutes [in those instances where there is any possible conflict] to give effect to each if we can do so while preserving their sense and purpose.' (cites omited) To accept the appellants' interpretation and to negate the plain language of § 157(b)(5) 'would violate the basic principle of construction that statutes should be read, if possible, as harmonious texts.' (cites omitted) We, therefore, have no difficulty in finding that *the distric judge's authority to fix venue of personal injury tort actions against the debtor exists under § 157(b)(5), irrespective of the district in which such controversy is pending.* (emphasis added).

788 F.2d at 1011. In the *A.H. Robins* case, the Court went on to state that the first and primary purpose of the proceedings is to ascertain whether a fair reorganization of the debtor can be achieved. *Id.* at 1012. This purpose may well be completely thwarted if the energies of the debtor's executives and officers are initially diverted by, and the resources of the debtor are dissipated in, the expenses of litigating the trial of thousands of personal injury suits in courts throughout the land spread over an interminable period of time. *Id.* No progress along estimating these contingent claims can be made until all claims and suits are centralized before a single forum where all interests can be heard and in which the interests of all claimants with one another may be harmonized. *Id.* at 1014. However, it should be noted that *A.H. Robins* did not address a situation involving a bankruptcy court, a district court sitting in bankruptcy, and claims previously transferred by the MDL to another district court.

The MDL has its authority to transfer "civil actions" for pre-trial proceedings under 28 U.S.C. § 1407. The MDL has recognized the bankruptcy stay against bankrupt defendants before it and those claims that have been stayed remain stayed in the transferee court of the MDL. *In re Asbestos Prod. Lia. Lit.*, 771 F.Supp. 415, 421, note 6 (J.P.M.L. 1991). The MDL Panel has noted that the transferee court should coordinate with the concerned bankruptcy courts. 771 F.Supp. at 421, n. 6. *In re Apex Oil Co.*, 980 F.2d 1150 (8th Cir. 1992) also recognized that the district court sitting in bankruptcy has the authority to fix the trial venue under Section 157(b)(5) or to abstain from the suits pending before the MDL transferee court. Based on these cases, this Court has authority over the cases before the MDL that are the subject of the Debtor's motion.

C. *If this Court does have jurisdiction, whether this Court must abstain or, alternatively, exercise its discretion to abstain pursuant to 28 U.S.C. § 1334(c).*

1. *Mandatory Abstention.*

A motion under section 157(b)(5), also requires an abstention analysis. *In re Pan American Corp.*, 950 F.2d 839, 844 (2nd Cir. 1991). The Tort Claimants' brief and other Claimants' objections and responses have moved that this Court abstain under 28 U.S.C. § 1334(c).

Section 157(b)(4) provides that "[n]on-core proceedings under § 157(b)(2)(B) of title 28 [liquidation of personal injury tort or wrongful death cases], shall not be subject to the mandatory abstention provisions of Section 1334(c)(2)." *In re Pan Am*, 950 F.2d at 845; 28 U.S.C. § 157(b)(4). This Court is exempted from mandatory abstention under Section 1334(c)(2).

2. *Discretionary Abstention.*

In their responses and at oral argument, the Claimants' attorneys urged that the Court abstain from transferring all of the breast implant cases involving the Debtor to the Eastern District of Michigan, specifically opposing the Debtor's proposition to hold one trial on the issue of causation for purposes of estimation. For the reasons more fully set forth below, the Court will not abstain its jurisdiction pursuant to 28 U.S.C. § 1334(c)(1) at this time. The Court will allow the Bankruptcy Court to proceed with the *estimation* process without holding the one causation trial requested by the Debtor.

Congress has indicated that courts should not be too quick to abstain from exercising their transfer powers under 28 U.S.C. § 157(b)(5). *In re Pan Am*, 950 F.2d at 845. Transfer should be the rule, abstention the exception. *Id.* The Court should weigh the advantages and disadvantages advanced at

the hearing. *A.H. Robins*, 788 F.2d at 1016. Factors enumerated by the *A.H. Robins* case, include:

> . . . some cases may be fully prepared and ready for state trial. Some cases may require substantial numbers of local witnesses. Claimants may be receiving critical medical, physical or psychological care in a local area which would have to be halted or transferred to Richmond. All of these factors are relevant.

Id. at 1016.

Issues of state law may also substantially affect the results in individual cases and must be considered. *Id.* The abstention doctrine manifests federal respect for State law and policy. *In re Pan Am*, 950 F.2d at 846. Section 1334(c)(1) of Title 28 of the United States Code provides for abstention by the district court in such instances:

> Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1334(c)(1). In *In re Pan Am*, the Court addressed two decisions by the district court involving its abstention from certain cases. *In re Pan Am* involved the Lockerbie air crash tragedy. The MDL panel had entered an order transferring all the federal cases to the Eastern District of New York. The *Pan Am* defendants subsequently filed voluntary petitions for reorganization under Chapter 11 of the Bankruptcy Code. All actions against the debtors were stayed by 11 U.S.C. § 362. Shortly thereafter, the *Pan Am* defendants moved for an order pursuant to 28 U.S.C. § 157(b)(5) transferring the Florida state-court actions, known as the "Coker" and the "Rosenkranz" actions to the Southern District Court of New York, where the bankruptcy proceeding was filed. The Pan Am debtors contemplated that the transfer to the Southern District of New York would be followed by another trans-

fer to the Eastern District of New York where the MDL was pending. The District Court in the Southern District of New York decided to abstain from exercising the court's transfer powers in both cases. On appeal, the Second Circuit reversed the district court's decision as to the Coker decision because the district court's actions were based on improper considerations. The Second Circuit held that the Coker action involved federal law questions, which could not be a basis for abstention. The Second Circuit, however, affirmed the district court's decision with regards to the Rosenkranz state court action because the Court found that the two-step transfer plan would engender further delay and expense. The debtors in the *In re Pan Am* case did not seek transfer of the cases already before the MDL to the district court where the bankruptcy was pending.

The issue of abstention in relation to the MDL arose in *In re Apex Oil Co.*, *supra*. There, the Court affirmed the district court's decision to abstain while the claimants' lawsuits proceeded in the multidistrict transferee court. The debtors in Apex had filed Chapter 11 bankruptcy in the Eastern District of Missouri. Acting under the authority of 28 U.S.C. § 1334(c)(1), the district court abstained from trying the claims, reasoning that the MDL had transferred the claims to the Eastern District of Pennsylvania. The bankruptcy stay was lifted so that the claimants could pursue their claims in the Eastern District of Pennsylvania. In *Apex*, the appellants claimed that the MDL had authority to transfer "lawsuits" only, but not bankruptcy claims, and that the district court's conclusion that their "claims" had been transferred was flawed. Reviewing that decision, the Eighth Circuit found that the distinction between lawsuits and claims does not negate the fact that the district court had the statutory authority to abstain while the claimants' lawsuits proceeded in the multidistrict transferee court. The Court wrote: "[e]ven though the 'claims' themselves may not have been transferred, we are not convinced that the district court should therefore be obliged to conduct duplicative proceedings in Missouri, thus

squandering the very economies which are the purpose of the multidistrict transfer." 980 F.2d at 1153. The District Court's order requiring all claimants to proceed against the debtors in the MDL court in Pennsylvania was also affirmed, the Eighth Circuit reasoning that it served the same purpose as the original order requiring multidistrict coordination of the other related cases.

The relationship between sections 157(b)(5) and 1334(c)(1), the abstention statute, was addressed by the Sixth Circuit in *In re White Motor Credit*, 761 F.2d 270 (6th Cir. 1985). The Sixth Circuit stated that in liquidating tort cases in bankruptcy, the district court should first decide whether to leave the cases with claims in the bankruptcy court in the courts where they are pending. If the Court decides against this course, the district court must then try the cases itself or send them to the federal court for the district in which they arose. *Id.* at 273. In *White Motor*, a confirmed plan of reorganization had already been established and only liquidation of damages was needed. The Sixth Circuit analysis is instructive in the instant case, even though the estimation process has not begun.

The Debtor contends that the estimation process would be more accurate if a causation trial was held first. Claimants offer that the estimation process could be accomplished within 60 days. They argue that the estimation process can be guided by the outcome of several actual trials already held as well as the number and value of cases previously settled with the Debtor. The Claimants further assert that valuation of the various types of cases by diseases and injuries already exists as a result of the Global Settlement in the breast implant cases. One causation trial is not needed for the estimation process where information already exists to accomplish the estimation process. The estimation should proceed before trial.

At oral argument, the Official Committee of Unsecured Creditors, arguing in favor of the transfer of all breast implant cases so that one causation trial can be held for the purpose of

estimation, addressed four cases for the Court to use as a guide for this proposition. Cited as a model for the causation trial is *In re Bendictin Litigation*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989) In that case, the Sixth Circuit affirmed the district court's trifurcation of the issues involving a products liability action. Although the Sixth Circuit affirmed the decision to hold one trial on the causation only, the *Bendictin* case did not involve a bankruptcy claim and the estimation of certain unliquidated, contingent claims from personal injury tort claims.

A second case cited in support of the Debtor's position is *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285 (2nd Cir. 1992). In that case, the district court approved a settlement agreement involving the debtor and a mandatory non-opt-out class of claimants. However, there was no issue of one causation trial for the purpose of estimation in that case. The *Drexel* case involved a settlement agreement pending confirmation of the debtor's reorganization plan. A causation trial was not involved in order to estimate the unliquidated and contingent claims in that case. It should also be noted that the *Drexel* case does not involve personal injury or wrongful death claims.

The third case is *Celotex Corp. v. Edwards*, 115 S.Ct. 1493, 1498-1499 (1995). The *Celotex* case only addresses the issue of whether or not the execution of a supersedeas bond based on a judgment in one district court is related to the debtor's bankruptcy pending in another district court. The case did not involve the issue of a causation trial held for the purpose of estimation.

The *A.H. Robins*, *supra*, is cited as the fourth case in favor of the transfer of cases and one causation trial for the purposes of estimation. In *A.H. Robins*, the Court noted that the bankruptcy court is not relieved of its duty in a Chapter 11 proceeding to estimate those contingent claims despite Section 157(b)(5) and before a trial is commenced. 788 F.2d at 1012. The Third Circuit stated:

Section 157(b)(2)(B) excepts from the definition of 'core proceedings' personal tort claims against the debtor. The bankruptcy court is without authority under the Act over 'the liquidation or estimation of contingent or unliquidated personal injury or wrongful death claims against the estate for purposes of distribution under Title 11' 28 U.S.C. § 157(b)(2)(B). (Italics added) It will be observed, however, that the statute denies authority to the bankruptcy court to 'estimate' contingent claims only if the purpose is to make a 'distribution' of the assets of the debtor; the statute does not in express terms deny to the bankruptcy court the authority, or relieve it of the duty, to 'estimate' the contingent 'personal injury' claims for purposes of determining the feasibility of a reorganization. And such has been the construction of the statute which has been adopted by the courts which have had to face the issue, the two leading cases being proceedings arising out of the asbestos litigation. (cites omitted) Both of these cases hold that estimations of the debtors' potential personal injury tort liabilities as an incident of the development of a plan of reorganization are core proceedings within the bankruptcy court's jurisdiction and that such estimations are not foreclosed by Section 157(b)(5) of the Act. (footnote omitted)

This is not to say the personal claimants in this proceeding will not be ultimately entitled, if they elect to do so, to have a jury trial of their claim in the district court. Section 157(b)(5) gives them that right. But, even though the tort claimants may be entitled to their jury trials, the bankruptcy court *is not relieved of its duty in a Chapter 11 proceeding to estimate those contingent claims*. The real question thus arises as to which proceedings takes precedence, whether the estimation by the bankruptcy court of the claims or the jury trials in the district court of the claims. The authorities which have considered this question in connection with a complicated products liability situation such as this are all unanimous. *The esti-*

> *mations of the potential and pending claims by the bankruptcy courts should precede any trials of the claims.*

788 F.2d at 1012 (emphasis added). Contrary to the proponents of the Debtor's motion to transfer and to hold a one causation trial for purposes of estimation, the *A.H. Robins* case states that the estimation process should occur first before any trials are held. The *A.H. Robins* court approved the district court's "tentative" order fixing the venue in the district court sitting in bankruptcy for all these claims. This Court finds the language in *A.H. Robins* does not foreclose this Court from ordering one or more causation trials to take place prior to the conclusion of the estimation process should the estimation process stall or if there is a need to test the accuracy of the estimation. Upon request of the Debtor. Claimants and/or the Bankruptcy Court this Court would entertain a subsequent motion to assist the estimation process by holding one or several trials. However, the estimation process must move forward first.

The Third Circuit Court further noted that having the estimation first before the trials would benefit all the claimants:

> . . . If the claimants as a whole are to realize reasonable compensation for their claims, it is obviously in the interest of the class of claimants as a whole to obviate the tremendous expense of trying these cases separately. If the bankruptcy court could arrive at a fair estimation of the value of all the claims and submit a fair plan of reorganization based on such estimation, with some mechanism for dispute resolution and acceptable to all interested parties, great benefit to all the claimants could be achieved and the excessive expense of innumerable trials, stretching over an interminable time, could be avoided. (footnote omitted) . . .

In re A.H. Robins, 788 F.2d at 1013. In remanding the matter for further notice and hearing, the *A.H. Robins* court was

mindful of the importance in balancing the advantages and disadvantages of having the trial in one district court or leaving the case at the state level. 788 F.2d at 1014, 1016. This Court is mindful that one or more causation trials held during the estimation process for the purpose of assuring a more accurate estimation can best be accomplished if all cases pending against the Debtor are before one court, the district court where the bankruptcy is pending. Coordination is therefore assured.

The Court agrees with the finding in *A.H. Robins* that the Bankruptcy Court should first estimate the unliquidated, contingent tort injury claims before a trial is held. As the Claimants argue, the estimation process can be accomplished in a short period of time. The Debtor has the information needed to value the unliquidated tort injury claims.

The Court notes that both the Debtor and the Claimants agreed during oral arguments the one causation trial will not resolve all the issues between the Debtor and the Claimants. Issues including individual liability, rupture of implants, mechanical causation, and disfigurement would not be addressed if only one causation trial were held. Further trials will be needed to resolve these issues.

Pending trial or other resolution, any removed claims against the Debtor should be subject to the MDL panel and such claims will be transferred to the MDL Judge for pretrial purposes which should not be inconsistent with the automatic stay of the Bankruptcy Court currently in effect as to the claims against the Debtor Dow Corning. All parties agree that the bankruptcy stay applies to all claims involving the Debtor. Therefore, there is no need to physically transfer the records of all the cases involving the Debtor to this District at this time. The Court also notes that many of the cases involving the Debtor are currently before the MDL judge. There is no need to waste resources of the court system, the Debtor and the Claimants with the physical transfer of all the case records involving the Debtor either to this District or the MDL transferee court. The Court will rely on the judgment of the trans-

feree judge to request from the transferor district clerks or the parties whatever case files and docket sheets he needs. The Court is also aware that alternative resolutions of many of the claims will occur prior to the liquidation/trial phase of the Debtor's bankruptcy which would obviate the need for physical transfer of the case records to this District for trial. Section 157(b)(5) does not mandate that all tort actions must be tried in district court, but only those which are not otherwise settled. *In re A.H. Robins*, 788 F.2d at 1013, n. 17. The Court further notes that unilateral dismissal of claims against a debtor under Fed.R.Civ.P. 41, or its equivalent by agreement and with judicial approval, assists rather than interferes with goals of Chapter 11. Such actions do not violate the automatic stay. *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 852 F.Supp. 226, 228 (S.D.N.Y. 1994). The MDL judge may enter such orders consistent with this Court's opinion and order.

The Court's decision that the estimation process should proceed without physically transferring the case files for one causation trial does not divest this Court of original and exclusive jurisdiction over the bankruptcy action pursuant to 28 U.S.C. § 1334(a). Should the Bankruptcy Court need more information for estimation purposes or reach the liquidation phase, the Court may again consider the issue of one or more causation trials should any party to the bankruptcy action request the Court to do so.

D. *Whether the claims against Dow Chemical Co. and Corning, Inc. should also be transferred to this Court and whether said claims are "related to" the Debtor's bankruptcy proceedings.*

The Court has jurisdiction under 28 U.S.C. § 1334(b) to "all civil proceedings . . . related to cases under title 11." "Related to" jurisdiction includes actions involving non-debtors that could "conceivably" have an effect on the Debtor's bankruptcy case. *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3rd Cir. 1984); *Robinson v. Michigan Consol. Gas*

Co. Inc., 918 F.2d 579, 583-584 (6th Cir. 1990). In a recent Supreme Court case, the Court addressed the "related to" jurisdiction of the Court:

> Congress did not delineate the scope of 'related to' jurisdiction, but its choice of words suggests a grant of some breadth. The jurisdictional grant in § 1334(b) was a distinct departure from the jurisdiction conferred under previous acts, which had been limited to either possession of property by the debtor or consent as a basis for jurisdiction. We agree with the views expressed by the Court of Appeals for the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (1984), that 'Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they might deal efficiently and expeditiously with all matters connected with the bankruptcy estate,' and that the 'related to' language of § 1334(b) must be read to give district courts (and bankruptcy courts under § 157(a)) jurisdiction over more than simple proceedings involving the property of the debtor or the estate.

Celotex Corp. v. Edwards, 115 S.Ct. 1493, 1498-1499 (1995).

As stated above, Dow Chemical and Corning, Inc. are each 50% shareholders ("Shareholders") of Dow Corning. According to Dow Chemical and Corning, Inc., they meet the "related to" test under § 1334(b). First, any judgment entered either for, or against either or both of the Shareholders will directly impact the Debtor's assets in bankruptcy. Any judgments against the Shareholders would generate claims for contribution against the Debtor which would need to be resolved as part of the bankruptcy plan process. Any judgment for the Shareholders would likely extinguish that plaintiff's claim against Dow Corning based on collateral estoppel. Second, the Shareholders' litigation will inevitably affect Dow Corning's rights under the insurance coverage it shares with either Shareholder, thereby diminishing the insurance available to the Debtor to fund a plan of reorganization and

delaying the time that proceeds of insurance settlements will be available. Third, because it is the Debtor's product that will be on trial in any Shareholder litigation, the Debtor may claim it would need to participate actively in the defense and the costs of such participation would divert attention from the Debtor's reorganization both in terms of money and time.

In response, the Claimants assert that the Shareholders are large and healthy corporations that have no right to enjoy the protections afforded by bankruptcy. A bankruptcy filing does not bar an action against the principal of a debtor-corporation. *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1205 (3d Cir. 1991). The Claimants further assert that the contribution claim by the Shareholders against the Debtor is theoretical at this time. In *Pacor*, *supra*, the Court held that the actions against the non-debtor would have no effect on the debtor's bankruptcy estate and therefore is not "related to" bankruptcy within the meaning of section 1471(b).[1] 743 F.2d at 995. The Third Circuit stated:

> . . . At best, it is a mere precursor to the potential third party claim for indemnification by Pacor against Manville. Yet the outcome of the Higgins-Pacor action would in no way bind Manville, in that it could not determine any rights, liabilities, or course of action of the debtor. Since Manville is not a party to the Higgins-Pacor action, it could not be bound by res judicata or collateral estoppel. (cites omitted) Even if the Higgins-Pacor dispute is resolved in favor of Higgins (thereby keeping open the possibility of a third party claim), Manville would still be able to relitigate any issue, or adopt any position, in response to a subsequent claim by Pacor. Thus, the bankruptcy estate could not be affected in any way until the Pacor-Manville third party action is actually brought and tried.

Id. at 995. The Third Circuit went on to state that without a judgment against the non-debtor, there could never be a third

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[1] Section 1471 is now 28 U.S.C. § 1334.

party indemnification claim against Manville. *Id.* The Claimants assert that a separate proceeding under 11 U.S.C. § 502 must be brought before the Bankruptcy Court if a judgment is rendered against the Shareholders.

Claimants state that if the real concern of the Shareholders is the fact that a certain insurance policy or policies are co-owned by the Debtor and Dow Chemical, then that issue should be brought to the Bankruptcy Court pursuant to *In the Matter of Vitek, Inc.*, 51 F.3d 530 (5th Cir. 1995). The Fifth Circuit in that case reversed the district court and affirmed the bankruptcy court's approval of certain settlements, finding that the bankruptcy court had jurisdiction over liability insurance policies where the debtor was a co-insured with other parties. The Fifth Circuit noted that a bankruptcy estate includes a debtor's interest in liability insurance under 11 U.S.C. § 541(a)(1). *In the Matter of Vitek*, 51 F.3d at 533.

In the instant case, as in Pacor, there will be no contingent claim by the Shareholders against the debtor for indemnification until such time as a judgment is rendered and, then, the non-debtors would still have to proceed with an entirely separate proceeding in order to obtain indemnification from the Debtor under 11 U.S.C. § 502. Joint tortfeasors are not indispensable parties in the federal forum. *Lynch v. Johns-Manville Sales Corp.*, 710 F.2d 1194, 1198 (6th Cir. 1983). The Bankruptcy forum provides for a mechanism to resolve the Debtor's liability for indemnification should a judgment be rendered against the Shareholders.

The insurance issue raised by the Shareholders is under the jurisdiction of the Bankruptcy Court pursuant to 11 U.S.C. § 541. Section 541 gives the Bankruptcy Court broad discretion over the Debtor's interest in a liability insurance policy where the Debtor is a co-insured with a non-debtor third-party. *In the Matter of Vitek*, 51 F.3d at 533. Given that there has been no judgment entered against the Shareholders, the Shareholders have no claim pending against the insurance policy at this time and there are currently no competing inter-

ests involved for the insurance funds as between the Debtor and its coinsured.

As to the Shareholders' argument that judicial economy would best be served if the cases against them were joined with the cases against the Debtor, the *Pacor* court has stated that "judicial economy itself does not justify federal jurisdiction." *Pacor*, 743 F.2d at 994. This Court finds that judicial economy alone does not justify this Court exercising jurisdiction over the non-bankruptcy actions involving the Shareholders. The claims involving the Shareholders are not related to the bankruptcy action before the Court. The Court has no jurisdiction over those claims pursuant to 28 U.S.C. § 1334(b).

E. *Motions and Proposed Orders Dismissing the Debtor and/or Remanding claims involving Dow Chemical and Corning, Inc.*

Various Claimants in their responses to the Debtor's motion to transfer and during oral arguments indicate that there are motions and proposed orders seeking to dismiss or sever the Debtor and/or remand the claims involving Dow Chemical and Corning, Inc. currently pending either in the district court to which Dow Chemical and Corning, Inc. removed the cases or before the MDL judge.[2] Given this Court's ruling that it has no Jurisdiction over the claims involving the Shareholders, those motions and/or orders to dismiss or sever the Debtor and/or remanding the claims to the state court should be addressed by the district court in which those claims are currently pending or by Judge Pointer if the case has been transferred to the MDL court. Furthermore, claims against the Shareholders currently pending before a state court should no longer be removed to the U.S. District Court if the only basis for removal is under 28 U.S.C. § 1334(b).

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[2] The Court notes that its July 5, 1995 Order Provisionally Transferring Certain Breast Implant Cases to this Court pending a hearing specifically stayed actions involving the Debtor, Dow Corning and did not stay any proceedings as to Dow Chemical or Corning.

III. *CONCLUSION*:

This Court finds it has jurisdiction over all the opt-out breast implant claims against the Debtor Dow Corning pursuant to 28 U.S.C. § 1334(a) and this Court does not exercise its discretion to abstain from this jurisdiction. The Court also has the sole authority to fix the trial venue for any personal injury trials in this matter pursuant to 28 U.S.C. § 157(b)(5). For the purpose of determining the trial venue of the breast implant cases or furthering the estimation process, the Court transfers the claims against the Debtor Dow Corning to this Court. However, the Court will not rule on the trial venue issue, at this time but will make that determination following the close of the estimation process. Pursuant to 28 U.S.C. § 157(b)(5), trial will either be here, in the district court in which the bankruptcy case is pending, or the district court in the district in which the claim arose as this Court may designate. The Court finds no physical transfer of case files or case records to the Eastern District of Michigan is necessary at this time and no such transfer should be made until further order of this Court.

Any removed claims against the Debtor will be subject to the MDL panel and such claims will be transferred to the MDL Judge for pretrial purposes only (the setting of the trial venue having been reserved by this Court) and such pre-trial proceedings shall not be inconsistent with the automatic stay of the Bankruptcy Court which is currently in effect as to the claims against the Debtor Dow Corning. Although Panel Rule 19(a) requires clerks of the transferor district courts to forward to the clerk of the transferee district court the complete original file and docket sheet for each transferred action, because of the voluminous files, the transferee MDL judge will determine whatever case files and docket sheets he needs from the transferor district clerks.

The Bankruptcy Court should proceed with its estimation process regarding these claims. However, a causation trial at this stage of the proceedings is not necessary. The Court does not foreclose its discretion or authority to hold such a trial or

trials at any point in the estimation process for the purpose of furthering or assisting the process should it be called upon to do so. Such motions should be addressed to this Court.

The Court finds it has no jurisdiction over the claims against the non-debtors Dow Chemical and Corning, Inc. and denies the Debtor's motion to transfer these claims. Claims against the non-debtors shall be remanded to state courts if the only basis for removal is the Court's "related to" jurisdiction. The Debtor Dow Corning shall be dismissed or may be severed from the claims against it and other non-debtor defendants in accordance with this opinion and claimants shall be allowed to proceed as scheduled against the non-debtors. Claims against the Debtor continue to be stayed pursuant to the automatic stay of the Bankruptcy Court.

Accordingly,

IT IS ORDERED that the Court has jurisdiction over all the opt-out breast implant claims against the Debtor Dow Corning pursuant to 28 U.S.C. § 1334(a) and is not exercising its discretion to abstain from this jurisdiction;

IT IS FURTHER ORDERED that the Court has the sole authority to fix the trial venue for any personal injury trials in this matter pursuant to 28 U.S.C. § 157(b)(5) and the Court GRANTS the Debtor's motion to transfer the opt-out breast implant cases for the purposes of setting the trial venue of the claims against the Debtor or furthering the estimation process if necessary. The Court will determine following the close of the estimation process, whether the trial venue of the personal injury tort claims, will be either in this Court, the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose pursuant to 28 U.S.C. § 157(b)(5);

IT IS FURTHER ORDERED that any removed claims against the Debtor will be subject to the MDL panel and such claims will be transferred to the MDL Judge for pre-trial purposes only (the setting of the trial venue having been reserved by

this Court) and such pre-trial proceedings shall not be inconsistent with the automatic stay of the Bankruptcy Court which is currently in effect as to the claims against the Debtor Dow Corning. Although Panel Rule 19(a) requires clerks of the transferor district courts to forward to the clerk of the transferee district court the complete original file and docket sheet for each transferred action, because of the voluminous files, the transferee MDL judge will determine whatever case files and docket sheets he needs from the transferor district clerks;

IT IS FURTHER ORDERED that no physical transfer of case files or case records to the Eastern District of Michigan should take place at this time nor until further order of this Court;

IT IS FURTHER ORDERED that the motion of the Debtor Dow Corning to transfer the breast implant cases for the purpose of holding one causation trial prior to the estimation process is DENIED without prejudice at this time, the Court reserving its authority to hold such a trial or trials to further the efforts of the estimation process;

IT IS FURTHER ORDERED that the Bankruptcy Court should proceed with an estimation process required by 11 U.S.C. § 502(c);

IT IS FURTHER ORDERED that the Debtor's motion to transfer the breast implant claims against the non-debtors Dow Chemical and Corning, Inc. to the Eastern District of Michigan is hereby DENIED;

IT IS FURTHER ORDERED that motions and proposed orders seeking to dismiss or sever the Debtor from claims against other breast implant defendants pending in either state courts or in federal district courts should be GRANTED and an order should be entered by those respective courts in accordance with this opinion and order;

IT IS FURTHER ORDERED that the claims against the non-debtors Dow Chemical and Corning, Inc. which have been

removed to federal district courts shall be REMANDED to the respective state courts if the only basis for removal is 28 U.S.C. §§ 1334(b) or 1367(a);

IT IS FURTHER ORDERED that the claims against the Debtor Dow Corning continue to be stayed pursuant to the automatic stay of the Bankruptcy Court until further order of the Bankruptcy Court;

IT IS FURTHER ORDERED that the time for removal of the opt-out breast implant claims pursuant to Bankruptcy Rule 9027(a)(2)(A) against the Debtor Dow Corning be enlarged to 30 days from the date of this Order or the Debtor Dow Corning may remove the claims 30 days after entry of an order terminating the stay pursuant to Bankruptcy Rule 9027(a)(2)(B);

IT IS FURTHER ORDERED that the MDL Judge may enter orders to remand, to dismiss and to sever any claims against non-debtors, including the Shareholders, in accordance with this Opinion and Order.

DATED: Sep 12 1995

/s/ DENISE PAGE HOOD
DENISE PAGE HOOD
United States District Judge

(2)

No. 97-210-CFX

Supreme Court, U.S.
FILED
OCT 6 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

OFFICIAL COMMITTEE OF TORT CLAIMANTS,

Petitioner,

—v.—

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, and CORNING INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT MINNESOTA MINING AND MANUFACTURING COMPANY

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred in ruling that it had jurisdiction in mandamus to enforce its mandate by reviewing the decision of the United States District Court for the Eastern District of Michigan, which ignored the Sixth Circuit's mandate to conduct an abstention analysis in strict compliance with the requirements of 28 U.S.C. § 1334.

2. Whether the Sixth Circuit erred in ordering the United States District Court for the Eastern District of Michigan to transfer silicone gel breast implant claims pending against nondebtor codefendants when those claims are "related to" the chapter 11 case of Dow Corning Corporation under 28 U.S.C. § 157(b)(5).

LIST OF PARTIES

In addition to the parties listed in the caption, the following are parties to the proceeding in the Sixth Circuit: Minnesota Mining and Manufacturing Company, Baxter International Incorporated; Baxter Healthcare Corporation; Bristol-Myers Squibb Corporation and Medical Engineering Corporation; Heidi Lindsey; Johnson County, Texas, Plaintiffs; Breast Implant Tort Claimants Represented by O'Quinn, Kerensky, McAninsh & Laminack; Office of the United States Trustee; Mississippi Physicians; MDL Panel; California Plaintiffs' Steering Committee, as *amicus curiae* and Official Committee of Unsecured Creditors, as *amicus curiae*.

RULE 29.6 LISTING

Pursuant to Supreme Court Rule 29.6, respondent Minnesota Mining and Manufacturing Company states that it does not have a parent company. Its subsidiaries (other than wholly owned subsidiaries) are Eastern Heights State Bank of St. Paul (Minn.), Sumitomo 3M Limited (Japan), 3M Health Care Limited (Japan), 3M Korea Limited (Korea), and Birla 3M Limited (India).

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Respondent, Minnesota Mining and Manufacturing Company ("3M") respectfully requests that the Court deny the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit (the "Petition") seeking review of the Sixth Circuit's decision in *Lindsey v. Dow Chemical Co. (In re Dow Corning Corp.)*, 113 F.3d 565 (6th Cir.), *petition for cert. filed*, 66 U.S.L.W. 3129 (U.S. Aug. 4, 1997) (No. 97-210) (hereinafter, "*Lindsey II*").

OPINIONS BELOW

The opinion of the Sixth Circuit in *Lindsey II* (Tort Comm. Pet. App., 1a-12a),[1] is reported at 113 F.3d 565 (6th Cir. 1997). On May 9, 1997, the Sixth Circuit issued its mandate (Tort Comm. Pet. App., 1a-12a). The opinion of the United States District Court for the Eastern District of Michigan (the "District Court Order"), which was reversed by the Sixth Circuit in *Lindsey II* (Tort Comm. Pet. App., 13a-20a), is unreported.

STATUTORY PROVISIONS INVOLVED

The principal statutory provisions involved are: 28 U.S.C. § 1334(c)(2), which provides:

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(d), which provides:

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[1] References to "Tort Comm. Pet. App." are to the Appendix to the Petition.

> Any decision to abstain or not abstain made under this subsection (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.

28 U.S.C. § 157(b)(5), which provides:

> The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

STATEMENT OF THE CASE

Dow Corning Corporation ("DCC") was the predominant producer of silicone gel breast implants until 1992 when it stopped manufacturing implants. Because thousands of recipients of silicone gel breast implants asserted claims for compensatory and punitive damages in federal and state court actions against DCC, on May 15, 1995, DCC was forced to file for protection under chapter 11 of title 11, United States Code (the "Bankruptcy Code"), in the United States Bankruptcy Court for the Eastern District of Michigan.

On the date DCC commenced its chapter 11 case, over 7,000 implant lawsuits, representing the claims of over 15,000 plaintiffs, had been filed against respondent 3M, which stopped manufacturing breast implants in 1984. Record 265; Boardman Decl. ¶4.[2] DCC has been named as a codefendant with 3M in over 5,000 of those 7,000 lawsuits. Record 265; Boardman Decl. ¶5. In virtually every one of

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[2] "Record ___" refers to the Record filed in connection with the decision below.

those 5,000 cases, plaintiffs asserted claims of joint and several liability against 3M and DCC for the full amount of their asserted damages. Record 265; Boardman Decl. ¶¶7-10. Additionally, in many of the implant cases, the plaintiffs received implants manufactured by DCC as well as implants made by 3M. Record 473; Letter to J. Hood of Aug. 4, 1995.

Thousands of other cases were also filed against Bristol-Myers Squibb Corporation and Medical Engineering Corporation (together "Bristol-Myers"), Baxter International Incorporated and Baxter Healthcare Corporation (together "Baxter"), as well as other defendants, including the 50% shareholders of DCC, The Dow Chemical Company and Corning Incorporated (the "Shareholders," and collectively with 3M, Bristol-Myers, and Baxter, the "Nondebtor Codefendants"). As with the cases against 3M, many of the cases against the other Nondebtor Codefendants also named DCC as a codefendant, asserted joint and several liability, and involved implants from multiple manufacturers.

Background

On June 25, 1992, the Judicial Panel on Multidistrict Litigation (the "MDL Panel") ordered the centralization of pretrial proceedings in all of the thousands of federal breast implant actions that have been filed against DCC and the Nondebtor Codefendants, and transferred the actions to Chief Judge Pointer of the Northern District of Alabama (the "Multidistrict Court"). *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, MDL No. 926, 793 F. Supp. 1098, 1099-1101 (J.P.M.L. 1992). The MDL Panel found that these actions involve complex common questions of fact and that centralization would best serve the convenience of the parties and witnesses, promote the just and efficient conduct of litigation, avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary. *Id.* at 1099-1101.

A proposed class action settlement (the "1994 Settlement") was reached among DCC, the Nondebtor Codefendants, and the plaintiffs' steering committee, and approved by the Multidistrict Court by order dated September 1, 1994. *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.)*, No. CV92-P-10000-S, MDL No. 926, Civ. A. No. CV94-P-11558-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994). On December 22, 1995, the Multidistrict Court approved a revised version of the 1994 Settlement, which did not include DCC as a settling party. *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig. (MDL 926))*, No. CV 94-P-11558-S (N.D. Ala. 1995) (Order No. 27 approving revised settlement program and injunctions).

Proceedings Below

A. *Lindsey I*

As a result of DCC's chapter 11 filing on May 15, 1995, the silicone gel breast implant actions of plaintiffs who had, at that time, opted out of the 1994 Settlement (collectively, the "Implant Actions") were automatically stayed from prosecution against DCC pursuant to 11 U.S.C. § 362(a). The Implant Actions against the Nondebtor Codefendants, however, were not stayed despite the fact that in most cases joint and several liability was asserted against DCC and one or more of the Nondebtor Codefendants.

In June 1995, DCC and the Nondebtor Codefendants filed separate motions pursuant to 28 U.S.C. § 157(b)(5) to transfer to the United States District Court for the Eastern District of Michigan (the "District Court") the claims asserted in pending federal and state court Implant Actions in which DCC was a party (collectively, the "Implant Claims"). By memorandum opinion and order, dated September 12, 1995 (Tort Comm. Pet. App., 49a-76a), the District Court asserted

jurisdiction under 28 U.S.C. § 1334(b) with respect to the Implant Claims pending against DCC and permitted transfer of such claims pursuant to 28 U.S.C. § 157(b)(5). *In re Dow Corning Corp.*, 187 B.R. 919 (E.D. Mich. 1995), *rev'd*, 103 F.3d 129 (6th Cir. 1996). Record 389. The District Court, however, denied the motion to the extent it related to claims against the Shareholders. *Id.* By separate memorandum opinion and order, dated September 12, 1995, the District Court denied all of the Nondebtor Codefendants' § 157(b)(5) transfer motions on the ground that the Implant Claims against the Nondebtor Codefendants were not sufficiently related to the DCC bankruptcy to confer jurisdiction pursuant to 28 U.S.C. § 1334(b). *In re Dow Corning Corp.*, 187 B.R. 934 (E.D. Mich. 1995). Record 388.

Moreover, the District Court did not abstain from adjudicating the Implant Actions against DCC. *In re Dow Corning Corp.*, 187 B.R. at 932. Record 389. Although it refrained from discussing the abstention issue in detail with regard to the actions against the Nondebtor Codefendants, the District Court "incorporated by reference its analysis of the abstention issue in its Memorandum Opinion and Order on the Debtor's Motion to Transfer." *In re Dow Corning Corp.*, 187 B.R. at 938. Record 388.

DCC and the Nondebtor Codefendants appealed the District Court's decisions to the Sixth Circuit. Applying the broad jurisdictional scope of 28 U.S.C. § 1334(b), the Sixth Circuit reversed the District Court's determinations that it lacked subject matter jurisdiction over the Implant Claims against the Nondebtor Codefendants and that it did not have the power to transfer those claims pursuant to 28 U.S.C. § 157(b)(5). (Tort Comm. Pet. App., 48a). *Lindsey v. O'Brien, Tanski & Young Healthcare Professionals (In re Dow Corning Corp.)* (hereinafter, "*Lindsey I*"), 86 F.3d 482 (6th Cir. 1996), *cert denied*, 117 S. Ct. 718 (1997). In *Lindsey I*, the Sixth Circuit concluded that a transfer would "further the prompt, fair, and complete resolution of all claims 'related to' bankruptcy pro-

ceedings and harmonize Section 1334(b)'s broad jurisdictional grant with the oft-stated goal of centralizing the administration of a bankruptcy estate." *Id.* at 497. The Sixth Circuit found that because the joint liability claims pending against DCC and the Nondebtor Codefendants give rise to contingent claims for indemnification or contribution among all of the defendants, including DCC, which could ripen into fixed claims, the potential that DCC will be held liable to the Nondebtor Codefendants for indemnification or contribution, or vice versa, "suffices to establish a conceivable impact" on DCC's estate and confer jurisdiction on the District Court. *Id.* at 494.

With respect to the issue of abstention, the Sixth Circuit found that the District Court failed to develop a full record on the issue, and declined to address the issue "in the first instance." Thus, the Sixth Circuit remanded the case to the District Court for further proceedings on the issue of abstention pursuant to 28 U.S.C. § 1334(c). *Lindsey I*, 86 F.3d at 498. In the Sixth Circuit's mandate, the District Court was instructed to decide whether the exception to mandatory abstention contained in 28 U.S.C. § 157(b)(4) applied to the Implant Claims, and if not, whether the factors calling for abstention were met in each action by conducting a case-by case analysis. *Id.* at 497-98.

The Official Committee of Tort Claimants (the "Petitioner") filed a petition for a writ of certiorari to the Sixth Circuit in an effort to overturn the Sixth Circuit's decision in *Lindsey I*. This Court denied the Petitioner's petition.

B. *Lindsey II*

Upon remand of *Lindsey I*, on July 30, 1996, the District Court abstained from adjudicating each and every Implant Claim pursuant to 28 U.S.C. § 1334(c)(1) and (2), (R.549, Order), without conducting the case by case analysis required under *Lindsey I*. 86 F.3d at 497. Specifically, Judge Hood abstained from *all* Implant Claims pending in state and fed-

eral courts, regardless of whether the plaintiffs in those actions had filed timely motions for abstention and regardless of whether the actions could have been commenced in a federal court absent jurisdiction under 28 U.S.C. § 1334. Having erroneously concluded that abstention was appropriate, the District Court prevented the transfer of Implant Claims that the Sixth Circuit in *Lindsey I* previously had found to be related to the DCC bankruptcy case.

DCC and the Nondebtor Codefendants sought review of the District Court's decision to abstain by the Sixth Circuit by both appeal and a petition for a writ of mandamus under 28 U.S.C. § 1651(a). The Sixth Circuit found that it had mandamus jurisdiction to review the District Court Order for the purpose of enforcing the court's prior mandate in *Lindsey I*, and ordered the District Court to transfer the claims against the Shareholders, Dow Chemical and Corning, to the District Court. The Sixth Circuit instructed the District Court to, upon completion of transfer, index and cross reference the cases "so that, in any proceeding in which a motion for abstention is filed, the district court may make the required abstention determinations and adequately state its reasoning as to each such proceeding." (Tort Comm. Pet. App., 12a). The Sixth Circuit declined, at that time, to extend its holding to the Nondebtor Codefendants other than the Shareholders. *Id.*

By order dated May 13, 1997, the District Court ordered the transfer of all Implant Claims against the Shareholders, whether pending in state or federal courts or later commenced, to the Eastern District of Michigan. On August 1, 1997, Judge Hood issued her first Case Management Order with respect to the Implant Claims against the Shareholders.

REASONS FOR DENYING THE WRIT

The procedural posture of the decision below weighs heavily against the Petitioner's request for a writ of certiorari. The questions presented are not ripe for review at this time

because the District Court has not decided whether to abstain from exercising its subject matter jurisdiction over each Implant Claim against the Shareholders. As a result, there is no controversy for the Court to resolve.

Moreover, the Petitioner has failed to demonstrate any compelling reason that would warrant this Court's review. While the issues are of importance to the parties to the proceeding, they are of minimal importance to the development of the law. The Petitioner has not demonstrated the existence of a conflict of decisions among the courts of appeals. Based on well-settled law, the Sixth Circuit had appellate jurisdiction and mandamus jurisdiction to review the District Court Order.

Finally, the Petitioner has failed to demonstrate that the Sixth Circuit misapplied 28 U.S.C. § 157(b)(5) by ruling that the District Court had the power to fix venue for trial of the Implant Claims against the Nondebtor Codefendants. Indeed, 3M respectfully submits that the Sixth Circuit should have done more than just transferring the Implant Claims pending against the Shareholders. The Sixth Circuit should have ordered the transfer of all Implant Claims against 3M and other Nondebtor Manufacturers, and centralized all Implant Claims in one forum so that they may be resolved in the efficient and orderly manner as contemplated under the provisions of § 1334.

I. THE PROCEDURAL POSTURE OF THE INTERLOCUTORY DECISION BELOW RENDERS THE ISSUES UNRIPE FOR REVIEW AT THIS TIME

The decision to grant certiorari "represents a commitment of scarce judicial resources." *City of Okla. City v. Tuttle*, 471 U.S. 808, 816 (1985). In this regard, the ripeness doctrine prevents the courts, "through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967). It is a principle of timing in which the Court must look at the situation at the present time rather than at the time of the

decision below. *Anderson v. Green*, 115 S. Ct. 1059, 1060 (1995) (citing *Blanchette v. Connecticut Gen. Ins. Corp. (Regional Rail Reorganization Act Cases)*, 419 U.S. 102, 140 (1974)). The doctrine is often used where future events may affect the justiciable nature of a controversy, making it more apt for review at a later date. *See, e.g., Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985). Thus, an action must be sufficiently mature so that it is considered an actual case or controversy as required by Article III of the United States Constitution. U.S. Const. art. III, § 2, cl. 1; *see also Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 57 n.18 (1993) ("ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction").

Although the Court has jurisdiction to review interlocutory judgments of federal courts of appeals, *see* 28 U.S.C. § 1254(1), the Court will generally not exercise its jurisdiction before a final judgment is issued in the lower courts. *See, e.g., Virginia Military Inst. v. United States*, 508 U.S. 946, 946 (1993); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases, the writ is not issued until final decree"); *Cobbledick v. United States*, 309 U.S. 323, 325 (1940).

The Court has frequently determined that issues remanded by courts of appeals were unfit for review pending final judgment and subsequent court of appeals review. For example, in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), the Court denied certiorari to review a decision of the court of appeals which remanded the case to the district court for the determination of an appropriate remedial course in the matter under review. *Id.* In refusing to grant the writ, the Court stated "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction." *Id.*[3]

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[3] *See also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this

Consistent with these authorities, the questions presented in the Petition are not ripe for Supreme Court resolution because the District Court has not made its final abstention determinations. In accordance with the directive of the Sixth Circuit, the District Court must index and cross reference the Implant Claims. Then, and only then, in any proceeding in which an abstention motion has been filed, can the District Court make abstention determinations containing adequate statements of its reasoning with respect to each determination. The issues of review of abstention determinations and the power to transfer claims against nondebtors pursuant to 28 U.S.C. § 157(b)(5) will not be appropriate for certiorari review until it is clear that claims will be transferred and adjudicated by the Eastern District of Michigan.

Accordingly, because the future effect of the decision below remains speculative in light of the actions yet to be taken by the District Court, the Court should deny certiorari as the questions presented are not ripe for review at this time.

II. THE PETITION FAILS TO DEMONSTRATE ANY COMPELLING REASON FOR THE COURT TO EXERCISE ITS DISCRETION TO GRANT CERTIORARI

The Court's review on a writ of certiorari is purely a matter of judicial discretion that is exercised "only for compelling reasons." Sup. Ct. R. 10. A petition for certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* Rather, the jurisdiction of the Court is "exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Court."); *cf. Mercer v. Theriot*, 377 U.S. 152, 153 (1964) (Court initially denied certiorari where court of appeals remanded case until subsequent rulings were issued by district court and court of appeals).

As the Court has observed, "it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *see United States v. Nobles*, 422 U.S. 225, 241-42 n.16 (1975) ("In the absence of . . . an indication that the issues are of sufficient general importance to justify the grant of certiorari we decline to entertain them.").

Here, the errors asserted by the petitioner present no "compelling reasons" for review by the Court. First, the Petitioner's assertion that the Sixth Circuit's use of mandamus was unprecedented is patently without merit. As explained below, the Sixth Circuit had clear authority to review the District Court Order. Second, there is no conflict between the circuits over an unsettled federal question of public importance. As is further explained below, the Sixth Circuit properly applied 28 U.S.C. §§ 157 and 1334, and did so in a manner that is wholly consistent with the only other circuit court decision that is directly on point. Accordingly, even if review at this time were not barred by the ripeness doctrine, the Petition should nevertheless be denied.

A. The Sixth Circuit Properly Asserted Mandamus Jurisdiction to Review the District Court Order

In an effort to obtain review by the Court, the Petitioner has mischaracterized the Sixth Circuit's decision as an "unprecedented use of mandamus," (Pet. at 13) which "amount[s] to effective nullification of the statutory bar." (Pet. at 7). In actuality, however, the Sixth Circuit had clear authority under well-settled and long-standing principles of law to assert mandamus jurisdiction to review the District Court Order.

1. Appellate Jurisdiction was Retained When the Sixth Circuit Remanded the Abstention Issue

As discussed above, the issue of abstention was properly before the Sixth Circuit, and no party in *Lindsey I*, including the Petitioner, questioned the Sixth Circuit's jurisdiction to review the District Court's rulings on the issue of abstention. And, in remanding this matter for further proceedings because the District Court failed to consider the abstention issue "in detail", the Sixth Circuit did not authorize the District Court to ignore the directives set forth in the *Lindsey I* mandate, and did not deprive itself of jurisdiction to consider the actions of the District Court on remand. Indeed, the Court retained plenary power to review the District Court Order after remand to determine whether or not the Court's mandate had been properly carried out, regardless of the appellate bar language of § 1334(d).

In refusing to address the abstention issue "in the first instance," the Sixth Circuit followed well-settled principles of appellate jurisprudence that: (1) an appellate court should not consider an issue on appeal in the first instance, and (2) that both judicial economy and efficiency are served if the lower court is given an opportunity to fully develop a record before the issue is reviewed on appeal. *See Super X Drugs Corp. v. Federal Deposit Ins. Corp.*, 862 F.2d 1252, 1256 (6th Cir. 1988) ("We believe that in the interest of justice in this case the district court should indicate and clarify the basis of its determination."); *Grover Hill Grain Co. v. Baughman-Oster, Inc.*, 728 F.2d 784, 793 (6th Cir. 1984) ("This Court . . . concludes that the failure of the trial court to make a specific finding as to the question of agency requires that the matter be remanded for clarification and/or further consideration of the agency issue."); *Belcon, Inc. v. Sherman Constr. Co.*, 800 F.2d 1321 (4th Cir. 1986) (declining to consider the district court's rulings on appeal in light of the sparse findings of fact by the district court).

Accordingly, the Sixth Circuit properly remanded the issue of abstention, which was properly before it in *Lindsey I*, so that a fuller record may be developed. And, in so doing, the Sixth Circuit retained the plenary power to ensure that the District Court complied with the Sixth Circuit's mandate.

2. The Sixth Circuit had Mandamus Jurisdiction Under the All Writs Act.

The jurisdictional authority to issue a writ of mandamus is provided by 28 U.S.C. § 1651(a), which states in part, "all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

When an appellate level court remands a case to the trial level court, the lower court must follow and implement the appellate court's mandate. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 71 F.3d 1197, 1201 (6th Cir. 1995) ("The customary procedure on remand creates a duty on the part of lower courts, which obtain jurisdiction after receiving the mandate of an appellate court, to obey the terms of the mandate and to carry it into effect."); *Kidder, Peabody & Co., Inc. v. Maxus Energy Corp. (In re Ivan F. Boesky Securities Litigation)*, 957 F.2d 65, 69 (2d Cir. 1992) ("The district court's actions on remand should not be inconsistent with either the express terms or the *spirit* of the mandate.") (Emphasis added).

Where the lower court fails to abide by the appellate court's prior mandate, the appellate court retains the plenary power to require compliance with its mandate. And, this plenary power extends to review orders that are not otherwise reviewable on appeal. *See United States v. E.I. Du Pont De Nemours & Co.*, 366 U.S. 316, 325 (1961) ("We have plenary power to determine whether our judgment was scrupulously and fully carried out."); *Bethea v. Levi Strauss & Co.*, 916 F.2d 453, 456 (8th Cir. 1990) ("If the district court fails to comply with an appellate mandate, the appellate court has authority to

review the district court's actions and order it to comply with the original mandate.").[4]

The foregoing provides clear authority to the Sixth Circuit to review the District Court Order, because the District Court failed to carry out the mandate of the Sixth Circuit.[5] Instead of undertaking the requisite analysis " 'in each individual case' " to determine if abstention would " 'promote or impair efficient and fair adjudication' " of the bankruptcy, the District Court abstained from *all* Implant Actions based upon a perfunctory and inaccurate appraisal of the actions as a generic whole. The District Court's failure to carry out the terms and spirit of the mandate provided a jurisdictional basis for review.

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[4] In exercising the authority to ensure that its mandate is properly carried out, the appellate court may review the lower court's order either through another appeal or by writ of mandamus. *See Baltimore & O.R. Co. v. United States*, 279 U.S. 781, 785 (1929) (lower court's "action may be controlled by this court, either upon a new appeal or by writ of mandamus"); *Continental Ins. Co. v. United States*, 259 U.S. 156, 166 (1922)(court has plenary power to determine whether the lower court complied with the court's mandate where "the decree in any proper way is brought to our attention"); *In re General Motors Corp.*, 3 F.3d 980, 983 (6th Cir. 1993) ("Under [the All Writs Act], the courts of appeals have the authority to, inter alia, issue writs of mandamus to district courts to ensure compliance with earlier mandates."); *Carroll v. Blinken*, 42 F.3d 122, 126 (2d Cir. 1994) ("we review de novo whether the judgment comports with our mandate in Carroll I, considering each of appellants' objections in turn.").

[5] It is well settled that a court of appeals' mandate encompasses the directives contained in the court's opinion. Fed. R. App. P. 41(a) ("A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue."); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 71 F.3d 1197, 1200 n.3 (6th Cir. 1995) (mandate consists of, *inter alia*, judgment and opinion); *United States v. Reyes*, 49 F.3d 63, 66 (2d Cir. 1995) (mandate consists of court's judgment and opinion). Thus, the Sixth Circuit's mandate includes its June 3, 1996 opinion.

3. Petitioner's Reliance on the Appellate Bar Language in Section 1334(d) is Misguided

Against this backdrop, the Petitioner incorrectly relies on the appellate bar language contained in section 1334(d) to suggest that the Sixth Circuit lacked mandamus jurisdiction to review the District Court Order. The Petitioner is mistaken. Courts have on numerous occasions granted mandamus petitions to vacate otherwise nonappealable remand orders and abstention determinations issued by district courts that incorrectly refused to exercise jurisdiction. *See, e.g, In re Burns & Wilcox, Ltd.*, 54 F.3d 475, 478 (8th Cir. 1995) (overturning order abstaining from exercising jurisdiction); *In re General Motors Corp.*, 3 F.3d 980, 983 (6th Cir. 1993) (issuing a writ of mandamus to vacate a remand order where the district court erred in determining that certain state law claims were not preempted by federal law); *Beard v. Carrollton R.R.*, 893 F.2d 117, 118 (6th Cir. 1989) (vacating remand order by writ of mandamus where basis for remand was unfounded).

While section 1334(d) does preclude appeals of abstention orders, the statute on its face does not bar mandamus review of such orders. Specifically, section 1334(d) provides that an abstention decision is not reviewable by "appeal or otherwise under sections 158(d), 1291 [and] 1292 . . . ." Each of these sections referenced in the statute involves appeals only, and none relates to mandamus petitions. Clearly, if Congress had sought to preclude review of abstention orders under § 1334 by writ of mandamus, it would have so stated.

Indeed, 28 U.S.C. § 1447(d) does not contain the qualifying language contained in § 1334(d), and consequently, § 1447(d) has been interpreted as precluding mandamus review of a remand order subject to that section. *See Thermtron*, 423 U.S. at 343 (section 1447(d) "prohibits review of all remand orders issued pursuant to § 1447(c) . . . whether review is sought by appeal or by extraordinary writ.").

Thus, contrary to Petitioner's assertion, the Sixth Circuit has not enlarged its appellate jurisdiction, but appropriately exercised its authority in mandamus to enforce its mandate.[6]

B. The Sixth Circuit Correctly Interpreted and Applied 28 U.S.C. § 157(b)(5)

The argument that the Sixth Circuit misinterpreted 28 U.S.C. § 157(b)(5) is equally without merit, providing no alternative basis for the Court to grant the writ. A necessary condition to implementing the reorganization policy underlying the bankruptcy laws is the centralization, to the maximum extent permitted by the United States Constitution, of all of the debtor's assets, as well as a process for dealing with all of the debtor's liabilities.[7] Consistent with congressional

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[6] Two other grounds exist for appellate jurisdiction, although the Sixth Circuit did not base its analysis on them. First, the appellate bar language of § 1334(d) does not apply if the statutory conditions contained in section 1334(c)(2) are not satisfied. *See In re S.G. Phillips Constructors, Inc.*, 45 F.3d 702, 708 (2d Cir. 1995) (where the statutory prerequisites to mandatory abstention had not been satisfied, the district court should not have even conducted a mandatory abstention analysis). Here, the Implant Claims should not have even been subject to the mandatory abstention analysis since two critical requirements of § 1334(c)(2) have not been satisfied: (1) the vast majority of the plaintiffs in those claims failed to file a motion, and (2) each of the Implant Claims could have been commenced in federal court based on federal diversity jurisdiction.

Second, appellate review of the District Court Order exists by pendent appellate jurisdiction because portions of the District Court Order are appealable. The District Court abstained from claims even though no timely motion had been filed and there was an independent basis for federal jurisdiction. Moreover, the District Court misapplied the statutory exemption under 28 U.S.C.§ 157(b)(4). Thus, even if the District Court properly abstained from transferring some of the Implant Claims, those claims are appealable because they are inextricably intertwined with the Implant Claims that the District Court improperly refused to transfer. *Brennan v. Township of Northville*, 78 F.3d 1152, 1157 (6th Cir. 1996) ("pendent appellate jurisdiction [appropriate] where the appealable and non-appealable issues are 'inextricably intertwined'") (citing *Swint v. Chambers County Comm'n*, 514 U.S. 35, 115 S. Ct. 1203, 1212 (1995)).

[7] Congress has provided the bankruptcy courts with powerful tools in order to accomplish these goals. *See, e.g.*, 28 U.S.C. § 1334(e)

intent and the provisions of the Bankruptcy Code, the Sixth Circuit properly construed § 157(b)(5) to permit centralization of claims against nondebtors in cases where the failure to centralize would harm the debtor's prospects of reorganization. *See A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 1011 (4th Cir. 1985) (congressional purpose of § 157(b)(5) was to "centralize the administration of the estate and to eliminate the 'multiplicity of forums for the adjudication of parts of a bankruptcy case' ") (quoting 130 Cong. Rec. H7492 (daily ed. June 29, 1984) (statement of Rep. Kastenmeier)), *cert. denied*, 479 U.S. 876 (1986).

Against this backdrop, Petitioner's contention that § 157(b)(5) can never authorize the transfer of claims against nondebtors, is wholly without merit. Indeed, the Petitioner does not cite a single authority to the contrary.

Section 157(b)(5) applies to "personal injury tort and wrongful death claims." It does not contain *any* limitations. Petitioner's argument that Congress must have meant personal injury or wrongful death claims against the estate because a different section (§ 157(b)(2)(B)) does refer to claims against the estate, is completely without merit.

As discussed, *supra*, this Court has held that 28 U.S.C. § 1334(b) applies not only to actions against debtors, but also to actions against nondebtors. *See Celotex Corp. v. Edwards*, 115 S. Ct. 1493, 1498-99 n.5 (1995) (proceedings "related to" bankruptcy include "suits between third parties which have an effect on the bankruptcy estate"). It follows, then, that other provisions of title 28 of the United States Code which are related to § 1334(b) should be interpreted in a consistent manner with that section. As this Court has stated, statutory construction is

> a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the

(exclusive jurisdiction of district court over all debtor's property wherever located); 11 U.S.C. § 541(a) (creation of estate comprised of property wherever located); 11 U.S.C. § 105(a) (nationwide service of process).

> statutory scheme—because the same terminology is used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.

United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 369 (1988).

Moreover, the Implant Claims against the Nondebtor Codefendants are, in effect, claims against DCC. As discussed, *supra*, the claims against DCC are inextricably intertwined with the claims against respondent and the other Nondebtor Codefendants because plaintiffs have sued DCC and the Nondebtor Codefendants jointly and severally. *Cf. American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 14 (1951) ("where there is a single wrong to plaintiff, for which relief is sought, arising from an interlocked series of transactions, there is no separate and independent claim or cause of action"). As the decision below held, the nature of the Implant Claims establishes that DCC and the Nondebtor Codefendants are "closely related" with respect to the implant litigation. *See also A.H. Robins Co. v. Piccinin (In re A.H. Robins Co.)*, 788 F.2d 994, 999 (4th Cir. 1985) (the unusual situation permitting § 362 to apply to nondebtors is the existence of "such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor"), *cert. denied*, 479 U.S. 876 (1986).

The Sixth Circuit's conclusion that § 157(b)(5) applies to claims against debtors as well as nondebtors is directly supported by the only circuit court of appeals decision directly on point—the *Robins* decision. Prior to the filing of its chapter 11 case, Robins was faced with five thousand Dalkon Shield actions filed in state and federal courts throughout the United States. *Id.* at 996. Over half of such actions named the debtor as the sole defendant, while the remainder named as defen-

dants both debtor and nondebtor parties, including the debtor's insurance company, hospitals, and physicians. The district judge granted the debtor's motion pursuant to § 157(b)(5) to transfer all five thousand actions, including those against nondebtor defendants, to the district court in which the bankruptcy case was pending. The scope of the order was very clear and explicitly transferred claims against nondebtor codefendants:

> ORDERED, pursuant to Sections 157(b)(5) and 1334(b) of Title 28 of the United States Code, that to the extent personal injury tort or wrongful death actions against Robins *or any other defendant* that are related to the Robins Chapter 11 case are to be tried in a district court, such action shall be tried in the Richmond Division of the United States District Court for the Eastern District of Virginia; and it is further
>
> ORDERED, pursuant to Section 1334(b) of Title 28 of the United States Code, that *all actions based upon personal injury tort or wrongful death claims* arising from the use of the Dalkon Shield intrauterine contraceptive device are proceedings related to this Chapter 11 case over which this Court has jurisdiction; and it is further
>
> ORDERED that *all actions* related to the Robins Chapter 11 case, as determined by this Order, now pending in any federal district court or subsequently removed to any federal district court during the pendency of this Chapter 11 case, be transferred by the Clerks of those Courts to this Court . . . .

In re A.H. Robins Co., No. 85-01307-R (E.D. Va. Nov. 9, 1985) (emphasis added).

On appeal, the Fourth Circuit confirmed the consolidation in the district court of all Dalkon Shield claims commenced against both the debtor and nondebtors:

> [T]here are very real considerations that support a centralization of *all* the Dalkon Shield claims, at least at

> first, in the district court having jurisdiction of the bankruptcy. The "single focal point" of this proceeding is the development of a reasonable plan of reorganization for the debtor, one which will work a rehabilitation of the debtor and at the same time assure fair and non-preferential resolution of the Dalkon Shield claims.

Robins, 788 F.2d at 1011 (emphasis added). *See also Murray v. Pan Am. World Airways, Inc. (In re Pan Am Corp.)*, 16 F.3d 513 (2d Cir. 1994) (§ 157(b)(5) applied to transfer of wrongful death lawsuits naming two Pan Am debtors and one nondebtor Pan Am affiliate).

Petitioner argues that the *Robins* decision should be ignored because no transfer of claims actually occurred. What Petitioner fails to state, however, is that after the Fourth Circuit concluded that centralization would be the rule, the parties reached a settlement in connection with a plan of reorganization. *See In re A.H. Robins Co.*, 880 F.2d 709 (4th Cir.) (approving settlement), *cert. denied sub nom., Anderson v. Aetna Cas. & Surety Co.*, 493 U.S. 959 (1989). The fact that the physical transfer of claims under § 157(b)(5) was rendered unnecessary as a result of the settlement has absolutely no bearing on the correctness or ultimate efficacy of the Fourth Circuit's decision. Indeed, because the Sixth Circuit's decision below is entirely consistent with the Fourth Circuit's decision in *Robins*, Petitioner has failed to demonstrate the existence of a circuit split regarding the interpretation of § 157(b)(5), which is a further reason for the Court to deny the Petition.

Accordingly, because the decision below interpreted the court's mandamus jurisdiction and sections 1334(d) and 157(b)(5) correctly, and does not conflict with the decision of any other court of appeals, the Court should deny Petitioner's request for certiorari.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

OFFICIAL COMMITTEE OF TORT CLAIMANTS,
Petitioner,
v.
DOW CORNING CORPORATION, et al., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, AND CORNING INCORPORATED IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the Sixth Circuit's ruling that it had mandamus jurisdiction when petitioner does not seek review of one of the Sixth Circuit's alternative grounds for mandamus jurisdiction — namely, that the district court had not complied with the Sixth Circuit's mandate in a previous appeal.

2. If so, whether the Sixth Circuit correctly held — as an alternative ground for the exercise of mandamus jurisdiction — that an abstention decision could be reviewed under the All Writs Act, 28 U.S.C. § 1651, when the abstention statute, 28 U.S.C. § 1334(d), provides only that abstention decisions are "not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title."

3. Whether district courts, in exercising the power to fix trial venue provided in 28 U.S.C. § 157(b)(5), may transfer, to the district where a bankruptcy is pending, claims that are related to the bankruptcy and may affect the size of the bankruptcy estate.

RULE 29.6 STATEMENT

The Dow Chemical Company and Corning Incorporated each own 50% of Dow Corning Corporation. The following is a list of nonwholly owned subsidiaries of Dow Corning Corporation:

Dow Corning de Argentina S.A.I.C.
Dow Corning de Brazil LTDA
Dow Corning de Colombia, S.A.
Dow Corning de Mexico S.A. de C.V.
Dow Corning de Venezuela S.A.
Dow Corning Chile S.A.
DC STI S.A.
Dow Corning S.A.
Dow Corning Hansil, LTD
Universal Silicones and Lubricants Private, Ltd.
SIL Trade
SDC Technologies, Inc.
Hemlock Semiconductor Corporation
Dow Corning Toray Silicone Co., Ltd.
Dow Corning Foreign Sales Corporation
DC Krafft S.A.

The Dow Chemical Company has no parent company. The following is a list of nonwholly owned subsidiaries of The Dow Chemical Company:

Dow Kakoh Kabushiki Kaisha
P.T. Dow Polymers Indonesia
Petroquimica Bahia Blanca S.A.I.C.
Polisur S.A.
INCA International SpA
Chemtech Royalty Associates, L.P.
Petroquimica - Dow S.A. (Petrodow)
Radian International LLC
EDN-Estireno Do Nordeste S.A.

Mycogen Corporation
DowElanco B.V.

Corning Incorporated has no parent company. The following is a list of nonwholly owned subsidiaries of Corning Incorporated:

Corning Incorporated Foreign Sales Corporation
Corning France, S.A.
Corning Japan K.K.
Corning Asahi Corporation
Corning Asahi Video Products Company
Iwaki Corning (M) SDN BHD
Dominique Dutscher, S.A.
Siecor Corporation
Siecor Mexico S.A. de C.V.
Siecor S.A. de C.V.
EuroKera S.N.C.
Keraglass S.N.C.
Samcor Glass Limited
Sicover, S.A.
Siecor GmbH
Siecor GmbH & Co. KG
International Hau-Mei Glass Engineering Co., Ltd.
Optical Waveguides Australia Pty. Ltd.
Pittsburgh Corning Europe N.V.
Pittsburgh Corning (U.K.) Ltd.
Shanghai Corning Engineering Corporation Ltd.
Optical Fibres
Samsung-Corning Co., Ltd.
Samsung Corning Company (Malaysia) SDN BHD
N-Cor, Ltd.
ACOR Programs, Inc.
CeraMem Separations, Inc.
Cormetech, Inc.
American Video Glass Company

Corporate Venture Partners
Samsung Corning Precision Glass Co., Ltd.
Corsam Glasstec R&D Center
Eurokera North America, Inc.
Fiber Sensys, Inc.
Molecular Simulations, Inc.
Pittsburgh Corning Corporation
U.S. Conec, Ltd.
Steuben Partners, L.P.
Quanterra Incorporated

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BRIEF FOR DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, AND CORNING INCORPORATED IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 113 F.3d 565. The opinion of the district court (Pet. App. 13a-20a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 8, 1997. The petition for writ of certiorari was filed on August 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

A. Background.

Dow Corning Corporation ("Dow Corning" or "the debtor") is a leading manufacturer of silicone industrial products. Along with its subsidiaries, Dow Corning sells more than 8,700 products, nearly all of which are made from silicones or otherwise incorporate silicone technologies. C.A. App. 208. In 1991, the peak year for sales of Dow Corning's breast implant products, silicone gel breast implants constituted less than 1% of Dow Corning's total sales. *Ibid.*

Studies by disinterested scientists have consistently found no connection between silicones and disease. The executive editor of *The New England Journal of Medicine* recently summarized the scientific testing as follows: "several good epidemiologic studies have failed to show an association between implants and a host of connective tissue diseases, symptoms, and abnormal lab tests. * * * The best evidence now is a relative risk of 1.0, indicating no contribution of implants to disease." Marcia Angell, *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant*

Case 195-197 (1996). Nonetheless, tens of thousands of recipients of Dow Corning's breast implants have sued in recent years, claiming to have contracted various diseases as a result of the silicones in their implants. *In re Dow Corning Corp.*, 86 F.3d 482, 485 (6th Cir. 1996) ("*Dow Corning I*"), *cert. denied*, 117 S. Ct. 718 (1997).

In thousands of these cases, the plaintiffs have sued not only Dow Corning, but also its corporate shareholders, The Dow Chemical Company ("Dow Chemical") and Corning Incorporated ("Corning") (collectively the "Shareholders"), even though neither Dow Chemical nor Corning designed, manufactured, tested, or sold breast implants. 86 F.3d at 485-86. All of the claims against the Shareholders are brought by plaintiffs who are also asserting the same claims against the debtor, seeking recovery for the same alleged injuries resulting from the same products — the debtor's implants. Pet. App. 9a-10a; C.A. App. 1499-1605. Thus, all of the cases against the debtor and its Shareholders raise the same threshold issue — do Dow Corning's implants cause disease, as the tort claimants assert? C.A. App. 123, 1500, 1504-1605. (Some cases include claims that implants have ruptured or leaked, but those cases also allege uniformly that the implants cause disease.) Throughout this litigation, Dow Corning and its Shareholders have suggested that the federal courts keep open the option of eventually holding a single trial to resolve this common, potentially dispositive, question. *E.g.*, C.A. App. 214-22, 861-73, 883-87, 895-96.

For many years, Dow Corning shared insurance coverage with Dow Chemical and Corning under a substantial number of liability insurance policies. As the court of appeals has noted, Dow Corning's interest in these policies and their proceeds constitutes "one of the largest assets of [the] bankruptcy estate"; the policies have total aggregate coverage limits of more than $1 billion. *Dow Corning I*, 86 F.3d at 494.

In addition, the court of appeals has held that if the claims against Dow Chemical and Corning proceed "'separately,'" the pool of joint insurance available to the debtor may be "'significantly reduce[d].'" Pet. App. 11a (quoting *Dow Corning I*, 86 F.3d at 495). This could occur because settlements or judgments paid by the Shareholders, or defense expenses incurred by the Shareholders in "litigating thousands of breast-implant claims in innumerable jurisdictions," Pet. App. 12a, may be reimbursed by joint insurance proceeds that would otherwise be part of the debtor's estate. *Dow Corning I*, 86 F.3d at 495.

B. The Proceedings Below.

1. The first appeal. Shortly after its Chapter 11 filing, Dow Corning moved under 28 U.S.C. § 157(b)(5) to transfer to the Eastern District of Michigan, where its bankruptcy case is pending, all pending breast implant claims involving Dow Corning implants — that is, all of the claims against Dow Corning and its Shareholders. Pet. App. 5a. In September 1995, the district court granted the transfer motion as to the claims against the debtor, but refused to transfer the claims against the Shareholders, ruling that the latter claims were not "related to" the debtor's bankruptcy case and thus not subject to the district court's jurisdiction under 28 U.S.C. § 1334(b). *In re Dow Corning Corp.*, 187 B.R. 919 (E.D. Mich. 1995).

In April 1996, the Sixth Circuit reversed the district court's refusal to transfer the claims against the Shareholders. First, the court of appeals held that those claims were "related to" Dow Corning's bankruptcy within the meaning of § 1334(b). *Dow Corning I*, 86 F.3d at 490-95. Second, the court held that district courts have the power, under 28 U.S.C. § 157(b)(5), to fix trial venue for claims "related to" the bankruptcy in the district where the bankruptcy is

pending. *Id.* at 495-97.[1] Finally, noting that "a Section 157(b)(5) motion 'requires an abstention analysis,'" the Sixth Circuit remanded for further proceedings, "for the district court to 'determine *in each individual case* whether hearing it would promote or impair efficient and fair adjudication'" of the bankruptcy case. 86 F.3d at 497 (emphasis added).

2. The second appeal. On remand, the district court again declined to transfer the claims against the Shareholders, this time on the ground that it would abstain from hearing those claims. Pet. App. 13a-20a. In so ruling, the district court did not consider the claims on an individual basis. Rather, the court ruled on abstention *en masse*, holding that all of the claims against the Shareholders were subject to mandatory abstention and that it would also exercise its discretion to abstain as to all of the claims. *Ibid.*

The Sixth Circuit again overturned the district court's decision, ruling that the district court's ruling was "fraught with clear error"; that its reasoning was, "in generous terms, inadequate," "troubling," and made "little practical sense"; and that the district court had, in several respects, "ignored" the Sixth Circuit's prior ruling. Pet. App. 8a-11a.

The court of appeals held "for two reasons that we have jurisdiction in mandamus to review the district court's

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[1] In so holding, the Sixth Circuit followed the Fourth Circuit's decision in *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986), another mass tort case. In *Robins*, the Fourth Circuit held that claims related to a bankruptcy case could be centralized in one forum under § 157(b)(5); this provided an opportunity to adopt a "mechanism for dispute resolution" that would obviate the need for "innumerable trials, stretching over an interminable time" and would avoid the "stupendous costs that would be involved if all the claims here had to be tried." 788 F.2d at 1013 (quoted at 86 F.3d at 496).

decision." Pet. App. 6a. First, the court explained, "this is not the ordinary situation" involving an abstention decision. *Ibid.* Rather, the Sixth Circuit in *Dow Corning I* "instructed" the district court "to undertake a case-by-case review" of each tort claim and determine, "as to each case, whether to abstain." *Id.* at 6a-7a. The district court, however, "completely disregard[ed]" that instruction and instead issued "blanket determination[s]" that abstention was appropriate. *Id.* at 8a. Since the district court "did not comply with our order of remand," the court of appeals concluded that it was "necessary and appropriate" to issue a writ of mandamus "to require the district court to conduct the abstention analysis in strict compliance with the requirements of § 1334 and our order of remand."[2] *Id.* at 7a.

The court of appeals also provided a "[s]econd," alternative ground for the exercise of mandamus jurisdiction. Pet. App. 7a. The court held that § 1334(d) — which provides that abstention decisions are "not reviewable by appeal or otherwise * * * under section 158(d), 1291, or 1292 of this title" — did not preclude its ability to review abstention decisions "pursuant to our mandamus authority

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[2] The court of appeals further explained that case-by-case abstention decisions were necessary "because of the paucity of evidence on the record" supporting abstention on a global basis. Pet. App. 9a. In "many" cases, the court noted, "there does not even appear to have been a motion for abstention filed by the plaintiff," and "[i]t is undisputed that some of the cases do not meet the requirements of mandatory abstention." *Id.* As for discretionary abstention, the district court "overlooked the risks to Dow Corning's estate that were clearly articulated in our prior decision" and, in particular, "ignored this Court's examination of the evidence [concerning the joint insurance] and made a conclusory finding to the contrary" — "without a hearing or the presentation of additional evidence." *Id.* at 10a-11a.

under 28 U.S.C. § 1651," since § 1334(d) "does not mention" § 1651. Pet. App. 7a.

REASONS FOR DENYING THE PETITION

The questions presented in the petition clearly do not warrant this Court's review. Petitioner's first question — whether § 1334(d) prohibits mandamus review under § 1651 — is purely academic. The court of appeals articulated *another* ground for mandamus jurisdiction — the district court's failure to comply with the Sixth Circuit's previous mandate — that petitioner does not even ask this Court to review (and which is obviously case-specific, presents no question of general importance, and is plainly correct in any event). Thus, a decision by this Court disagreeing with the Sixth Circuit's construction of § 1334(d) would have no effect on the judgment of the court of appeals.

Even if resolution of the § 1334(d) question could change the outcome of this case, there is no circuit conflict on the issue whether that statute prohibits review by mandamus, and the Sixth Circuit's decision is fully consistent with this Court's precedent and the settled canons of statutory construction. Nor are the circuits divided on whether a district court has the authority, in setting trial venue under 28 U.S.C. § 157(b)(5), to transfer cases within the district court's "related to" bankruptcy jurisdiction to the district where the bankruptcy is pending for trial. Indeed, in accordance with the plain language of the statute, the circuits have uniformly upheld the power to order such transfers in appropriate cases. See, *e.g.*, *Robins*, 788 F.2d at 1010.

In short, there are no "compelling reasons," Rule 10, for reviewing the questions presented by the petitioner. Not only is there no conflict among the courts of appeals, but a decision by this Court on petitioner's principal ground for review would not change the result below. Accordingly, there is no basis for granting the petition.

I. REVIEW OF THE § 1334(d) QUESTION IS UNWARRANTED.

A. A Ruling By This Court Will Have No Effect On The Decision Below Since Petitioner Does Not Seek Review Of The Sixth Circuit's Alternative Basis For Jurisdiction.

The first argument in the petition — that this Court should review the Sixth Circuit's ruling on whether § 1334(d) permits mandamus review of abstention decisions — is simply inexplicable. As noted above, the Sixth Circuit's principal basis for mandamus jurisdiction was not § 1334(d), but that the district court, on remand, failed to comply with the Sixth Circuit's mandate in *Dow Corning I*. Petitioner asserts briefly that this holding is "untenable" (Pet. 9-10), but it does not ask this Court to review this alternative holding by the court of appeals. That being the case, there is no reason for the Court to consider the Sixth Circuit's *other* rationale for exercising mandamus jurisdiction. This Court typically does not decide questions that would not alter the result in the court below. *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945); Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* 173 (7th ed. 1993).

Even if petitioner had sought review of the Sixth Circuit's conclusion that the district court failed to comply with the appellate court's earlier mandate, that question would not come close to satisfying the stringent standards required for this Court to grant certiorari. This ruling by the court of appeals is no more than an application, to the particular facts of this case, of the well-settled rule that an appellate court may issue a writ of mandamus "if the lower court 'does not proceed to execute the mandate, or disobeys and mistakes its meaning.'" *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427 (1978) (quoting *United States v.*

Fossatt, 62 U.S. (21 How.) 445, 446 (1859)). See also, *e.g.*, *General Atomic Co. v. Felter*, 436 U.S. 493, 497 (1978) ("if a lower court 'mistakes or misconstrues the decree of this Court, and does not give full effect to the mandate, its action may be controlled * * * by a writ of mandamus'"). And while this Court is not foreclosed from reviewing the court of appeals' interpretation of the scope of its mandate, the Court consistently has "recognized that 'the court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes.'" *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 227 (1947) (quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940)); see also *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 379 (1965) ("Obviously, the court which drafted the mandate is normally in the best position to determine whether the Commission's subsequent order is consistent with the mandate").

Here, the Sixth Circuit's previous directions were unequivocal. In *Dow Corning I*, the court of appeals explicitly instructed the district court that in conducting its "'abstention analysis'" on remand, it had "to 'determine *in each individual case* whether hearing it would promote or impair efficient and fair adjudication'" of the debtor's bankruptcy case. 86 F.3d at 497 (emphasis added). The district court disregarded that instruction, deciding abstention on a *global* basis rather than conducting "the necessary case-by-case inquiry" mandated by the Sixth Circuit's prior opinion. Pet. App. 9a. The district court also "ignored" key evidentiary conclusions settled by the Sixth Circuit in the first appeal and made "contrary" findings "without a hearing or the presentation of additional evidence." *Id.* at 11a. Accordingly, even if petitioners had sought certiorari on the question, there would have been no cause for this Court to

review the plainly correct judgment of the court of appeals that its mandate had been disobeyed.

In these circumstances, the Sixth Circuit was not required to sit by helplessly while the district court disobeyed its instructions and ignored its conclusions. Quite the contrary — a court of appeals unquestionably has the "power to require its judgment to be enforced as against any obstruction that the lower Court, exceeding its jurisdiction, may interpose." *Delaware, L. & W. R. Co. v. Rellstab*, 276 U.S. 1, 5 (1928) (Holmes, J.). And it possessed the discretion "to issue mandamus to protect [its] mandate" even assuming *arguendo* that the district court's abstention decision would not otherwise be reviewable. *United States v. United States Dist. Ct.*, 334 U.S. 258, 264 (1948) (holding that the Second Circuit had the power to issue a writ of mandamus to enforce its prior mandate, even assuming that it would have no jurisdiction over future appeals in the case). "[T]he fact that mandamus is closely connected with the appellate power does not necessarily mean that the power to issue it is absent where there is no existing or future appellate jurisdiction to which it can relate." *Id.* at 263. Thus, an appellate court may issue a writ of mandamus in order to "protect[ ] a past exercise of jurisdiction," even though the court may "have nothing to do with any other appeals in the case." *Id.* at 264. "The power to compel obedience with the mandate turns on whether the lower court has obstructed enforcement of it," not whether the court of appeals will have jurisdiction over future appeals. *Id.* at 265.

All of this has long been settled. When this is coupled with petitioner's failure to seek review of the Sixth Circuit's particular application of this rule, it is evident that there is no basis for this Court to review the Sixth Circuit's conclusion that it had jurisdiction to issue a writ of mandamus in this case.

B. In Any Event, The Sixth Circuit's Construction Of § 1334(d) Is Correct And Is Fully Consistent With Prior Precedent.

Even if there were not an independent ground for the Sixth Circuit to exercise mandamus jurisdiction, that court's construction of § 1334(d) is clearly correct under established rules of statutory construction. Moreover, the Sixth Circuit's decision on this issue does not conflict with the holdings of any other courts of appeals.

The starting point in construing any statute is, of course, "the language of the statute itself." *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989). Section 1334(d) provides that abstention orders are "not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title." This means precisely what it says: parties may not seek review of a district court's abstention rulings under sections 158(d), 1291, or 1292. The statute plainly does not, however, bar review under § 1651; that provision is conspicuously absent from the list of provisions contained in § 1334(d). In interpreting a statute, "[o]ne must * * * listen attentively to what it does *not* say." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 536 (1947) (emphasis added).[3]

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[3] *Things Remembered, Inc. v. Petrarca*, 116 S. Ct. 494 (1995), does not shed any light on whether mandamus review is barred by the language of § 1334(d), because that was not a mandamus case and thus the Court had no cause to consider the significance of the omission of § 1651 from the statutory enumeration. The defendant in that case filed an appeal from the district court's remand order, not a mandamus petition. See *id.* at 496.

This reading of § 1334(d) is supported by the doctrine of *expressio unius est exclusio alterius*. Under this long-established canon of construction, the references to particular statutory provisions in § 1334(d) must be read to exclude others, including § 1651. See, *e.g.*, *Leatherman v. Tarrant County Narcotics Unit*, 507 U.S. 163, 168 (1993) (a heightened pleading standard is not required for *Monell* actions, because while Fed. R. Civ. P. 9(b) requires "greater particularity in pleading certain actions," it "do[es] not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983"); *Lindh v. Murphy*, 117 S. Ct. 2059, 2063 (1997) (chapter 153 of the Antiterrorism Act does not apply to pending cases because the statute provides only that chapter 154 of the act applies to pending cases); *Felker v. Turpin*, 116 S. Ct. 2333, 2341 (1996) (Stevens, J., concurring) (noting that the section of the Antiterrorism Act providing that certain orders "shall not be appealable and shall not be the subject of a petition for * * * writ of certiorari" does not "purport to limit our jurisdiction * * * under the All Writs Act, 28 U.S.C. § 1651"). As the Ninth Circuit concluded in an analogous case, "[i]t would be an odd use of language" for a statute to list certain sections of the U.S. Code "if the references to particular sections were not meant to exclude others." *Longview Fibre Co. v. Rasmussen*, 980 F.2d 1307, 1313 (9th Cir. 1992). "No sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated." *Ibid.*

Congress knew full well how to foreclose mandamus as an avenue for seeking appellate review, had it wanted to do so. Most strikingly, 28 U.S.C. § 1447(d), the statute involved in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), provides unequivocally that certain remand

orders are "not reviewable on appeal or otherwise" — without qualifying that language by listing only certain statutory provisions, as in § 1334(d). Thus, not only is it unquestionably false to state that those two statutes have "identical language" (Pet. 8), but the absence in § 1334(d) of a blanket prohibition on appellate review like that found in § 1447(d) is a compelling indication that Congress intended that § 1334(d) be less sweeping in effect. See *Patterson v. Shumate*, 504 U.S. 753, 758 (1992); *Potter v. United States*, 155 U.S. 438, 446 (1894) (noting that the word "wilful" used to describe certain offenses but not others in same statute "cannot be regarded as mere surplusage; it means something").

Petitioner's interpretation of § 1334(d) reads the enumerated sections right out of the statute. If petitioner were correct that Congress intended only to clarify that "abstention decisions in the bankruptcy court may be reviewed in the district court" alone (Pet. 11), it could simply have stated that decisions under § 1334(c)(2) are not reviewable by the courts of appeals — period. There certainly would not have been any need to go on and list §§ 158(d), 1291, and 1292, each of which is a means to obtain review by the court of appeals, unless the intention was to limit the breadth of § 1334(d) with respect to the courts of appeals, so that the bar on appellate review applied only to certain routes of review.[4] Congress would not have recited some (but not all) of the possible bases for obtaining appel-

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[4] In light of the specific statutory references in § 1334(d), the last two words in the "appeal *or otherwise*" phrase in that statute cover not mandamus (since § 1651 is not listed), but 28 U.S.C. § 1292(b). Appellate review under that statute is discretionary; a party seeking to invoke § 1292(b) must file an "application" for leave to appeal with the court of appeals, not a notice of appeal.

late jurisdiction if it had intended to prevent a court of appeals from reviewing abstention decisions in every single circumstance. The inclusion of those specific sections of Title 28 would be mere surplusage under petitioner's theory, and this Court has stated repeatedly that it will not construe a statute so that part of the statute is rendered meaningless. See, *e.g.*, *Walters v. Metropolitan Educ. Enterprises, Inc.*, 117 S. Ct. 660, 664 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect"); *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 562 (1990) ("Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment"); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute,' * * * rather than to emasculate an entire section, as the [petitioner's] interpretation requires").

Petitioner attempts to override the plain statutory language with a lengthy quotation from the legislative history of § 1334(d). Pet. 11-12. But the quoted passage is not even close to being "'clear contrary evidence of legislative intent'" (Pet. 10); indeed, it says nothing at all about the reasons why Congress chose, in § 1334(d), to list only certain provisions in Title 28 and not § 1651. And the notion that particular language used by Congress in drafting a statute — here, the enumeration of certain sections of the United States Code — is rendered insignificant by silence in the legislative history turns settled rules of statutory construction upside down. Plain language trumps legislative history, not the other way around, *Ron Pair Enterprises*, 489 U.S. at 241; *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992), and all the more so when the legislative history cited does not say a word about the language in dispute.

Thus, the Sixth Circuit's decision is fully consistent with established rules of statutory interpretation. And petitioner

does not (and could not) argue that there is any split in the circuits on the construction of § 1334(d).[5/] Accordingly, even if the Sixth Circuit did not have an alternative basis for mandamus jurisdiction, the first question presented in the petition does not warrant this Court's review.

II. THE SIXTH CIRCUIT'S RULING THAT THERE IS A POWER TO TRANSFER UNDER § 157(b)(5) IS CORRECT AND IS CONSISTENT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The second question presented by petitioner concerns a district court's ability to transfer claims that affect a bankruptcy case: petitioner contends that district courts have *no* power under 28 U.S.C. § 157(b)(5) to transfer *any* claims that are within the district court's "related to" bankruptcy jurisdiction, 28 U.S.C § 1334(b). Pet. 13-17. In other words, petitioner's theory is that even if it is indisputable that claims against non-debtors will have an effect on a bankruptcy case — say, by dissipating joint insurance proceeds that would otherwise be available to the estate — a district court would have no authority to transfer such cases to the district in which the bankruptcy was pending. Rather, a district court would have the power to transfer *only* claims asserted directly against the debtor.

1. No court has ever adopted such an extreme limitation on the power to transfer, which would deprive courts of the opportunity in mass tort litigation (and in other bankruptcy cases) to achieve a prompt, fair, and complete

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5 At one point (Pet. 9), petitioner quotes a passing statement in *In re United States Brass Corp.*, 110 F.3d 1261, 1266 (7th Cir. 1997), but that court's observation, concerning 28 U.S.C. § 1452(b), is clearly dicta. Moreover, that decision does not take into account Congress's decision to limit the scope of the statute by barring review only under certain provisions in Title 28.

resolution of all claims that are related to a bankruptcy.[6] Moreover, there is no disagreement among the courts of appeals on the question of statutory construction posited by petitioner. The only other circuit to address the issue presented here — whether personal injury claims "related to" a bankruptcy may be transferred under § 157(b)(5) when those claims are not against the debtor — agrees with the Sixth Circuit. In *Robins*, the Fourth Circuit answered that question in the affirmative, reaching the same conclusion as that reached by the Sixth Circuit here. See 788 F.2d at 1010 (affirming an order transferring claims against non-debtors to the district in which the bankruptcy was pending; "[u]nquestionably" the district court "had the power under [§ 157(b)(5)] to fix the trial venue in its district for all the Dalkon Shield cases").[7]

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[6] Petitioner cites *In re United States Lines*, 128 B.R. 339 (S.D.N.Y. 1991), for the proposition that § 157(b)(5) is not a venue-setting provision for claims that are related to a bankruptcy (Pet. 14-15), but that case involved only claims against the debtor, not "related to" claims. And the only holding in that case was that claims pending in state court could not be transferred to federal court under § 157(b)(5) — a ruling that is no longer good law, having been rejected by the Second Circuit. See *In re Pan Am. Corp.*, 16 F.3d 513, 516 (2d Cir. 1994) ("the plain language" of § 157(b)(5) "authorize[s]" the transfer of cases from state court to federal court).

[7] Petitioner's contention that the *Robins* court did not order the transfer of claims against non-debtors (Pet. 16) is meritless. The Fourth Circuit unequivocally upheld the district court's authority to order the transfer to the Eastern District of Virginia of "*all actions related to* the Robins' Chapter 11 case now pending in any federal district court or subsequently removed," including claims against non-debtors. 788 F.2d at 998 (emphasis added).

2. Petitioner's argument that § 157(b)(5) is limited to claims "against the debtor" (Pet. 14) is also contrary to the plain language of the statute. The phrases "against the debtor" and "against the estate" are nowhere to be found in § 157(b)(5); rather, the statute grants district courts the authority to set the venue for trials of "personal injury tort and wrongful death claims" generally. Nor is there anything to the argument that because Congress referred *elsewhere* in § 157 to personal injury claims "against the estate," it must have intended to apply this same limiting qualification to the district court's powers under § 157(b)(5). See Pet. 15 (quoting § 157(b)(2)(B)). Precisely the opposite is true — Congress's decision to qualify personal injury claims in one section but not in another demonstrates clearly that "Congress, *when it desired to do so*, knew how to restrict the scope of" personal injury claims. *Patterson*, 504 U.S. at 758 (emphasis added). Congress's use of a "broader phrase" in § 157(b)(5) than in § 157(b)(2)(B) "strongly suggests that it did not intend to restrict the provision in the manner that petitioner[s] contend[ ]." *Ibid.*

3. The purpose of § 157(b)(5) is to centralize claims related to the bankruptcy in one forum in order to facilitate reorganization. *Dow Corning I*, 86 F.3d at 496; *In re Pan Am. Corp.*, 950 F.2d 839, 845 (2d Cir. 1991); *Robins*, 788 F.2d at 1011. As the court of appeals recognized, the statute gives district courts the ability, in appropriate cases, to transfer all personal injury claims "related to" a bankruptcy because without this power, courts could not eliminate fragmented, duplicative, and wasteful litigation of "related to" claims, which would inevitably harm the reorganization process.[8] *Dow Corning I*, 86 F.3d at 496-97. Indeed, if

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[8] Centralization is particularly important with regard to the Shareholders because, wholly apart from the effect of separate

(continued...)

the transfer of "related to" claims were not permitted, there would be little point in having courts decide whether a suit involving non-debtors was "related to" a bankruptcy case; that exercise only makes sense if a court can *do* something if the cases *are* related, like ordering a transfer.

* * *

The Sixth Circuit's refusal to deprive district courts of the flexibility to consolidate all related claims in the district in which the bankruptcy is pending is fully supported by precedent, logic, and the language of § 157(b)(5). There is no reason for this Court to grant review on the second question presented in the petition.

(...continued)
litigation on the debtor's interest on the joint insurance, "[t]he claims against the shareholders arise from an identical set of facts and are merely duplicates of those against Dow Corning," which have "already been transferred to the Eastern District of Michigan." Pet. App. 9a-10a. As the court of appeals recognized, requiring plaintiffs seeking compensation for one injury to litigate the same issues on two fronts — as part of the bankruptcy process *and* in state court — would serve only to "expand[ ] an already overwhelming litigation burden." *Id.* at 10a.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

OFFICIAL COMMITTEE OF TORT CLAIMANTS,

Petitioner,

—v.—

DOW CORNING CORPORATION, THE DOW CHEMICAL COMPANY, and CORNING INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner undertakes herein only to meet arguments advanced in respondents' brief in opposition that were not adequately anticipated in the petition.[1]

1. The Purported Violation of the Sixth Circuit's Mandate Is an Insubstantial Diversion From the Central Question Regarding the Effect of 28 U.S.C. § 1334(d)

The Court of Appeals stated two grounds -- enforcement of its mandate and application of the *expressio unius* maxim -- to find mandamus jurisdiction despite the clear proscription in 28 U.S.C. § 1334(d) against appellate review of decisions granting abstention under § 1334(c). *See* Pet. App. 6-7. Respondents suggest that the important question about § 1334(d) posed by the petition may be avoided altogether on the first ground, which they now elevate to the "principal basis for mandamus jurisdiction" (Br. in Opp. 7). But that argument devises a "mandate" from patently *obiter dictum* on a subject that was in no way presented by the first appeal.

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[1] The mandamus order of which review is sought runs neither for nor against Minnesota Mining and Manufacturing Company ("3M"), which, accordingly, is not named as a respondent to the petition for a writ of certiorari. That company has nevertheless filed a 20-page brief opposing certiorari. While petitioner believes 3M lacks standing here, its brief is not in any event a substantial addition to the papers already before the Court. It seems clear, for instance, contrary to 3M's view, that the central issue of the Circuit's appellate jurisdiction is not less ripe for review than was the similar issue in *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336 (1976). Litigation against Dow Chemical in courts throughout the country has been halted and transferred as a result of the decision below, causing current injury to thousands of claimants notwithstanding the District Court's potential ability to entertain individual abstention motions at a later procedural point.

It is no ground for avoiding review of the squarely presented question respecting § 1334(d).

The only question on which the Sixth Circuit ruled in the first appeal, there being no occasion to consider an abstention decision that had not yet been made, concerned "the subject matter jurisdiction of federal district courts, sitting as bankruptcy courts, over proceedings 'related to' a case filed under Chapter 11 of the Bankruptcy Code, and the ability of federal district courts to transfer such proceedings to the district court in which the bankruptcy case is pending." *Lindsey v. O'Brien, Tanski, Tanzer & Young Health Care Providers (In re Dow Corning Corp.)*, 86 F.3d 482, 485 (6th Cir. 1996), *cert. denied*, 117 S. Ct. 718 (1997) (Pet. App. 22a). Reversing the District Court on the "related to" question, and finding there was power to transfer, the Circuit remanded, leaving the still open question of abstention to the District Court and making the observations on how to deal with abstention that are now put forth by respondents as a "mandate." But those expressions concerning what might or should happen did not and could not create in advance appellate jurisdiction over a subsequent abstention decision rendered non-reviewable (as petitioner urges) by 28 U.S.C. § 1334(d).

The unquestioned authority of *United States v. District Court*, 334 U.S. 258 (1948), affirming the appellate power to enforce an actual mandate by mandamus (*see* Br. in Opp. 9), has no bearing here. Jurisdiction of the type urged exists only to enforce an appellate court's decision of "whatever was before [the] court, and disposed of by its decree." *Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978). Here, it is plain that abstention was not before the Court of Appeals on the first apeal, and the dictum about

abstention could create no "mandate" because it dealt with no issue presented for decision. Of course, this Court retains clear authority to determine the scope of the lower court's mandate. *See FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 379 (1965).

The finding by the Circuit of mandamus power despite § 1334(d) is not insulated from review and not rendered "purely academic" (Br. in Opp. 7) by the supposed alternative or "principal" basis respondents invoke. If, as petitioner urges, the Circuit's treatment of § 1334(d) is important and mistaken, the correction of the error will be a definitive, final, and authoritative reversal, unaffected by the purported mandate issue.

2. The Sixth Circuit's Construction of 28 U.S.C. § 1334(d) Does Violence to the Clear Intent of Congress

Without revisiting the misuse of *expressio unius*, the substantial departure from this Court's precedents, and the neglect of legislative history argued in the petition (at 10-13), petitioner notes some distortive devices to which respondents are led in defending what the Court of Appeals wrote. Urging a textual, "plain language" analysis, respondents stress that § 1334(d) bars review by mentioning 28 U.S.C. §§ 158(d), 1291, and 1292, but not mentioning § 1651 (mandamus). But the plain language leads them finally to the point where § 1334(d) says an abstention decision "is not reviewable by appeal *or otherwise*." The italicized words are faced down in a footnote (p. 12 n.4), where we are told that these words refer not to mandamus but to interlocutory appeals under 28 U.S.C. § 1292(b). That surprise comes from nowhere and rests on nothing; the filing of an "application" rather than a "notice" of appeal does not render

the proceeding any less an *appeal* -- leaving respondents without an explanation for the "or otherwise" language. The argument from plain language collapses.

By a parity of flawed analysis, respondents announce that the legislative history teaches nothing despite the unequivocal statement, quoted in the petition (p. 11), showing that the enumeration of specific courts and statutes was designed precisely to mark district court appellate power over bankruptcy court abstention decisions while barring any further appeals to the circuits or to this Court. That in turn is dismissed with the pronouncement (Br. in Op. 12) that Congress could have expressed this purpose in another way. The wisdom of Justice Holmes, on Circuit almost a century ago, remains apt: "[I]t is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908).

Nor can respondents escape the controlling principles announced in *Things Remembered, Inc. v. Petrarca*, 116 S. Ct. 494 (1995), on the ground that no formal mandamus petition was filed in that case. *See* Br. in Opp. 10 n.3. The same is true here -- respondents filed only a notice of appeal, which the Court of Appeals chose to treat as a mandamus petition. This Court found no basis for reaching out in the same manner to create jurisdiction in *Things Remembered*.[2]

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[2] 3M misleadingly suggests (Br. 15) that courts have routinely granted mandamus to review abstention decisions subject to the clear bar of § 1334(d). No such case exists. Those cited by 3M involved court-made abstention doctrines, *e.g.*, *In re Burns & Wilcox, Ltd.*, 54 F.3d 475, 476 (8th Cir. 1995) (recognizing availability of mandamus "'[a]bsent statutory prohibitions'") (citing *Thermtron*, 423 U.S. at

(continued...)

3. Section 157(b)(5) Was Not Intended to Effect Mass Transfer of Nondebtor Litigation

The transfer power found by the Court of Appeals in 28 U.S.C. § 157(b)(5) over tort claims against nondebtors is justified by respondents as a needed means to "centralize" such claims in the bankruptcy court with claims against the debtor. The undocumented assertion is belied by experience. The transfer order has been nothing more or less than a formula for paralysis, blocking thousands of suits against nondebtors while not advancing the bankruptcy proceedings in the slightest degree. The now insulated shareholder corporations have never evinced a desire to have their transferred cases do anything but rest immobile on the now overloaded docket of the United States District Court for Eastern Michigan. Now, in the bankruptcy, the Debtor is seeking to give its shareholders a free release of all liability through its plan of reorganization -- a ploy that does not involve trying the claims against the shareholders and makes clear that transfer was sought not to permit centralized adjudication but to forestall litigation. The suggestion that transfer was or is necessary to "facilitate reorganization" (*id.* at 16) is a myth. The situation underscores the widely destructive fallacy of the Sixth Circuit's ruling that transfer

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[2](...continued)

353) or cases remanded on grounds not authorized by 28 U.S.C. § 1447(c) and hence reversible on mandamus notwithstanding § 1447(d), *e.g.*, *In re General Motors Corp.*, 3 F.3d 980, 983 (6th Cir. 1993).

of nondebtor litigation was contemplated by the drafters of § 157.[3]

Respondents suggest (Br. in Op. 16) that since § 157(b)(5) does not repeat the language in § 157(b)(2) referring to personal injury claims "against the estate," it must have been intended to empower the district court to transfer all personal injury claims against any defendant. But if Congress had meant to create such a sweeping and novel power over nondebtor litigation, it would likely have done so expressly and not by negative implication in a statute otherwise devoted to dividing up business within the bankruptcy between the district and bankruptcy courts.

Respondents' central argument for their broad reading of § 157(b)(5) is the supposed Congressional policy mandating total centralization of all conceivably "related to" litigation in the bankruptcy forum. While the Sixth Circuit holds that it has located such a policy, Congress has never expressed it. The Circuit relied for this point on two distinguishable cases -- *A. H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir.), *cert. denied*, 479 U.S. 876 (1986), which as noted (Pet. 16-17) focused its analysis almost entirely on claims against the debtor and in any event involved only a single product and

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[3] Respondents cannot seriously suggest that they act to prevent "requiring plaintiffs seeking compensation for one injury to litigate the same issues on two fronts." Br. in Opp. 16-17 n.8. Respondents' mission is to minimize, not maximize, convenience and recovery for tort plaintiffs. Moreover, the suggestion that the claims against the shareholders are "merely duplicates" of those against the Debtor (Br. in Opp. 16-17 n.8) is incorrect at best. Dow Chemical has been held liable by at least two juries for its separate and independent tortious conduct in connection with the testing and development of silicone for implantation in the human body.

manufacturer,[4] and *Murray v. Pan Am. World Airways, Inc. (In re Pan Am. Corp.)*, 16 F.3d 513 (2d Cir. 1994), which concerned only claims against Pan Am and its affiliates.

The legislative history underlying *Robins* and *Pan Am.* does not reflect that Congress gave any consideration to nondebtor claims in expressing a policy to promote centralization of bankruptcy proceedings. For example, Rep. Robert Kastenmeier's oft-quoted statement that the purpose of § 157 was to avoid "creating a multiplicity of forums for adjudication of parts of a bankruptcy case" actually had nothing to do with transferring claims against nondebtors:

> The House-passed bill contained a definition of what a bankruptcy judge could properly do. The Senate bill adopted a largely similar view with one exception. Under the Senate-passed bill, bankruptcy judges could not hear unliquidated claims. The Senate approach would have repudiated decades of bankruptcy law and practice. The change in the definition in the Senate-passed bill would have contradicted the basic purposes of the consolidated jurisdiction we adopted in 1978 in response to the recommendations of the Commission on Bankruptcy Laws. Finally, it would have dissipated the assets of the estate by creating a multiplicity of forums for the adjudication of parts of a bankruptcy case.

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[4] Petitioner did not, as Dow alleges (Br. in Opp. 15 n.7), claim that no transfer was ever *ordered* in *Robins*. However, the transfer initially ordered by the district judge was never *effected* because the notice required by the Fourth Circuit was never given to individual plaintiffs. Our sufficient point is that the absence of such transfer did not impede resolution of the bankruptcy. *See* Pet. 21.

130 Cong. Rec. H7492 (daily ed. June 29, 1984) (citation omitted), *reprinted in* 4 *Collier on Bankruptcy* (Appendix) XX-18 through XX-19 (15th ed. 1996).

In context, it is clear that Rep. Kastenmeier was concerned only about preserving centralized liquidation of *claims against the estate*. His statement cannot be read to show that this venue-setting provision was intended to create broad new powers to transfer nondebtor cases. The Sixth Circuit has read into § 157(b)(5) a power never intended by Congress, a sound additional reason for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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